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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

THE EXECUTIVE

By KAREN D. BECK

CONSTITUTIONAL CONVENTION STUDY NO. 13

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of reports by the Commission is in fulfillment of that responsibility.

This study on the executive in Montana was written by Karen D. Beck, research analyst on the Commission staff. The Commission has authorized publication of the report as approved by the Research Subcommittee on the Executive consisting of Commission members R. H. "Ty" Robinson, Missoula, chairman; Charles A. Bovey, Great Falls; William G. Sternhagen, Helena, and Clyde L. Hawks, St. Xavier. This report concerns not only what the present Montana Constitution says about the executive, but how those provisions are working in practice. In addition, constitutional provisions and trends from other states are used for comparative purposes.

The Commission extends its appreciation to state officials who cooperated in the preparation of this study. This report is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

Energy in the Executive is a leading character in the definition of good government.

Alexander Hamiltion

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SUMMARY

CHAPTER I

INTRODUCTION: AN HISTORICAL SKETCH OF THE GOVERNORSHIP

Constitutionally weak governors and strong legislatures were created in the original states in response to experience with colonial governors who represented an absentee monarch. Although some states almost immediately attempted to reverse this weak-governor tradition, other influences -- such as Jacksonian democracy and expanding governmental activity -- tended to further weaken the administrative power of the governor. The nationwide reorganization movement sought to rectify the problem of weak executive administration.

Because the position of Montanans during this state's territorial status was somewhat similar to that of the colonists, the framers of the 1889 Constitution created a gubernatorial office which could exercise only limited executive authority.

Commentators on the executive branch of government agree that although it is important that administrative effectiveness be fostered, executive responsibility also must be assured.

CHAPTER II

THE OFFICE OF GOVERNOR: STRUCTURAL PROVISIONS

Some of the present Montana constitutional provisions structuring the office of governor are confusing as to their effect -- for example, Article VII, Section 4 to the average citizen would probably indicate that none of the seven elective officials in the executive department may assume another public office, such as United States Senator, during the four-year term of office to which he was elected. In addition, the present constitutional provisions do not resolve the issue of when succession to the governorship occurs.

The most pertinent questions confronted in this chapter are:

--Should gubernatorial elections coincide with presidential elections?

--When should the governor's term of office begin?

--Should the constitution make specific provision for determining gubernatorial disability?

--Is the office of lieutenant governor necessary? If so:

--Should the governor and lieutenant governor be elected jointly?

Some additional questions and questions subsidiary to those listed above which are raised in this chapter are:

--Should the constitution retain the prohibition on dual officeholding?

--Should the constitutional provisions relating to the qualifications of the governor be modified?

--Should all restrictions on compensation be eliminated from the constitution?

--Should a simple majority vote of all house members remain as the requirement for starting impeachment proceedings?

--Should the senate remain the tribunal for the trial of impeachments?

--Should the constitution distinguish between temporary and permanent gubernatorial disability?

--Should the absence of the governor from the state continue to be treated as rendering him "unable" to function as governor?

--If the office of lieutenant governor is retained, should the constitution specify his duties?

--Should the governor be authorized to fill a vacancy in his alternate's office by appointment, subject to legislative approval?

CHAPTER III

POWERS OF THE GOVERNOR

In Montana, the governor's power to effectively supervise the executive branch of government is weakened by the existence of six other constitutional elective officials; most observers contend that such divided authority prevents the electorate from fixing responsibility.

Presently, only the governor is authorized to convene the legislature in special session and to determine the special session agenda; some observers believe this power should be shared with the legislature. In addition, some contend that the governor's veto power should be modified.

The Constitution is unclear as to the effect of gubernatorial "restoration to citizenship" and gubernatorial pardon. On the other hand, the Constitution presently devotes an entire article to military affairs, a subject largely controlled by detailed federal legislation and regulations.

The most significant problems in the area of gubernatorial powers include:

--What executive offices should be provided for in the constitution? Which should be elective?

--Should gubernatorial appointees be subject to legislative approval?

--Should there be a constitutional provision vesting the governor with power to remove appointees? If so, should removal be subject to legislative approval?

--Should proposed constitutional amendments be subject to gubernatorial veto?

--Should the legislature be permitted to convene itself in special session?

--Should the power of the governor to limit subjects to be considered in special session be removed?

--Should judges initially be appointed by the governor?

Some additional questions are:

--Should the veto power of the governor be extended?

--Should the length of time for gubernatorial consideration of bills be increased?

--Should the constitution eliminate the pocket veto?

--Should the constitution authorize the legislature to consider post-adjournment vetoes?

--Should an entire constitutional article be devoted to military affairs?

CHAPTER IV

THE EXECUTIVE BRANCH: ORGANIZATION AND STRUCTURE

The process of executive reorganization begun in the Executive Reorganization Act of 1971 may be fully effectuated at the option of the Constitutional Convention. Thus, probably the most significant issue concerning the executive is whether the constitutional status of elective officials, boards and agencies should be eliminated. In addition, the Convention probably will consider the desirability of a merit system for state employees.

This chapter again confronts such questions as:

--What executive officers should be provided for in the constitution? Which should be elective?

--Should the constitution specify any boards, bureaus or agencies other than elected officials?

--To what extent should administrative structure be defined and specified in the constitution?

Additional questions are:

--Should the constitution vest in the governor power to initiate reorganization of the executive branch? Should such reorganization be subject to legislative approval?

--Should administrative departments be headed by single executives or by multi-member boards?

--Should the constitution require a merit system for state administrative departments?

CHAPTER I

INTRODUCTION: AN HISTORICAL SKETCH OF THE GOVERNORSHIP[1]

The position of the first state governors contrasted sharply with--and probably was at least partly a result of--the position of the colonial governors. The colonial governments were highly centralized around the governors, who represented an absentee monarch. The governor was dominant in the colonies and exercised extensive powers. Typically, he appointed the chief civil officers of the colony, served as commander-in-chief of its military forces, supervised law enforcement, granted pardons and reprieves, recommended legislation, was empowered to dissolve or adjourn the assembly, and often exercised absolute veto and supreme judicial powers. Whether validly or not, by the time of the Revolution the colonial governors were deeply resented as being inefficient and corrupt, if not tyrannical.

The first state constitutions drafted after the Declaration of Independence reflected colonial mistrust of executives and confidence in legislatures. The typical governor was subordinate to the legislature: in most states he was elected by the legislature for a one-year term and was ineligible for re-election; his authority to initiate and execute policy was virtually nonexistent and he had no veto power; he was required to consult with an executive council in the performance of the few responsibilities he had. In addition, the legislature appointed many other state officers, who operated independently of the governor.

However, by the time of the Convention of 1787 which drafted the United States Constitution, the states' brief experience with weak governors apparently aided in making the arguments for a strong President prevail. In turn, the federal model of a single strong chief executive influenced subsequent development of the state governorship. During the nineteenth century, and at least partially in response to legislative abuse of power and loss of prestige, the office of governor gradually was strengthened and made independent of the legislature. The governor was made elective by direct popular vote; gubernatorial terms were lengthened and successive terms were authorized; the governor was vested with veto and appropriation powers.

But even while the governor was being strengthened and made influential as a legislative and policy leader, the executive was weakened by internal division. In response to the principles of Jacksonian democracy, widespread election of administrative officials was instituted. Numerous independent boards and commissions also were constitutionally established with which the governor was required to share executive power.

Moreover, as the economic and social fabric of the states became more complex state governments were required to enter new areas of activity. For each new activity the legislature usually created a board, commission or agency, independent of one another and of any gubernatorial supervision. The effects of such multiplicity were formulation of different--and often conflicting--policies in related areas and competition for spheres of control; at the same time, fragmentation left gaps in government regulations and services to the public.

The reorganization movement, originating early in the twentieth century on the national level, extended to the states in response to their administrative structures of numerous overlapping and independent state agencies. The reorganization movement embodied several goals, including:

1. Consolidating and reducing the number of agencies into a more rational organization;

2. Increasing gubernatorial policy-making powers through such tools as the executive budget;

3. Increasing gubernatorial administrative authority by empowering him to appoint and remove administrative heads;

4. Strengthening the governor's management controls by providing longer terms and greater staff aids.

In short, reorganization sought to centralize executive authority in the governor.

In its transition from territorial status to statehood, Montana's position was somewhat comparable to that of the original colonies. Thus, Montana's territorial governors were appointed by a superior political power whose philosophy was often in conflict with the political philosophy dominant in the territory. Montanans therefore were often restive under their appointive territorial governors. Like the framers of the early state constitutions, the delegates to the 1889 Constitutional Convention did not intend to vest the governor with significant executive power, as is shown in the remark made by one of them:

> I think in the first place that the office of Governor is more of an ornament than anything else. The duties are less than that of any other officer mentioned in this section . . . . The Secretary of State, State Auditor, State Treasurer, or Superintendent of Public Instruction, either one of them, do a great deal more

> work--two or three times more work, and some of them ten times more work--than the Legislative Assembly will ever impose upon the Governor. The Governor need not remain at the Capitol but during periods when official duties are to be performed. The routine duties of his office can be performed by his private secretary . . . . It [the position] is almost a sinecure anyhow, and you can wipe it out of existence and not do the state any harm. It is like a great many other things that come down to us from the misty past. We have got it and we will hold on to it . . . .[2]

Instead of a strong governor, the delegates established a framework of seven elected executive officials as well as ten boards, commissions and agencies. Moreover, some of these boards--such as the Board of Examiners--were vested with extensive powers.

Although Montana's governor was not subordinated to the legislature as were the governors of the original states, his constitutional authority was not extensive because of the presence of independently elected constitutional officers and constitutionally created boards, commissions and agencies. Since the ratification of the Montana Constitution, the legislature had added numerous boards and agencies to the state's administrative structure; finally, it was deemed necessary to follow the national trend of the reorganization movement. The 1971 Legislature enacted a plan which, when fully implemented, will reduce to nineteen the number of principal departments; however, under Article VII, Section 21 of the Montana Constitution (effective November 20, 1970), the constitutionally elected officers are excluded from the consolidation.

Although attention nationally and in Montana seems to have centered on strengthening the executive through consolidation and other means, methods of assuring executive responsibility also have received attention. Observers in another state have adequately described how that responsibility can be achieved:

> The American system of separation of powers, with auxiliary checks and balances, is one of the principal controls in American constitutions against abuse of power. In addition to the restrictions of the state bill of rights, all state constitutions vest power in the legislature and the courts to curb executive abuses. Of the two, the most important is the popularly elected and responsible legislature.

A strong executive should be counterbalanced by a strong legislature, fully staffed and empowered to play its proper role both in policy making and in overseeing its execution. Ample staff, control of the purse strings, authority to control structure, powers and procedure, investigation, the legislative postaudit, and removal of present limitations on legislative power are major components of vigor in the lawmaking body. Impeachment is another legislative weapon which is authorized in all constitutions except that of Oregon; it has been used, however, relatively infrequently against state officers. The legality of executive actions may also be challenged in the courts. But the judiciary does not attempt to control the exercise of discretionary power and usually avoids direct personal conflict with the governor.

Under a democratic system of government there must be heavy reliance on the people to meet their responsibilities. Popular constitutional controls include the power to elect or to re-elect and the recall. A competitive two-party system, a well-developed pattern of interest groups, and a free and responsible press are other nonconstitutional restraints. Ultimately, the force of public opinion expressed through the ballot is the most basic and effective restraint on executive excesses.[3]

CHAPTER I

NOTES

1. The content of this chapter is based largely on Leslie Lipson, The American Governor from Figurehead to Leader (Chicago: University of Chicago Press, 1939).

2. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), p. 442.

3. Albert L. Sturm and Fred S. Steingold, The Executive and Civil Service in the Michigan Constitution (Lansing: Constitutional Convention Preparatory Commission, 1961), pp. 21, 22.

CHAPTER II

THE OFFICE OF GOVERNOR: STRUCTURAL PROVISIONS

INTRODUCTION: THE CONSTITUTIONAL SETTING

The basic provisions structuring the office of governor are found in Article VII of the Montana Constitution; however, several provisions outside that article also affect the office. The Constitution specifies qualifications for the office, determines the time of election and term for the governor, discusses compensation and provides for succession to the governorship and removal of the governor from office.

More specifically, the 1889 document provides that, in addition to five other executive branch officials, a governor and lieutenant governor shall "be elected by the qualified electors of the state at the time and place of voting for members" of the legislature; in the event of a tie, the house and senate by joint ballot elect one of the contenders [Art. VII, Sec. 2]. Term of office is four years [Art. VII, Sec. 1]; candidates for governor and lieutenant governor must be at least 30 years old, residents of Montana for "two years next preceding" election and United States citizens [Art. VII, Sec. 3].[1] By constitutional directive, the governor must reside at the seat of government [Art. VII, Sec. 1].

The terms of office of the first elected executive department officials were constitutionally terminated on the first Monday of January in 1893 [Art. VII, Sec. 1]. This termination date necessitated the election of successors in 1892; thus, gubernatorial elections in Montana coincide with presidential elections, and the governor's term of office begins on the first Monday of the following January.

Although the governor's compensation initially was established in the Constitution, that document specifically provides that the compensation can be changed by legislation. The clause in Article VII, Section 4 which authorized legislative establishment of the salary of the governor (and of the five other elective officers of the executive department) does not, however, apply to the lieutenant governor. Instead, the Constitution declares:

> The lieutenant-governor shall receive the same per diem as may be prescribed by law for the

> speaker of the legislative assembly, to be allowed only during the sessions of the legislative assembly. [Montana Const. Art. VII, Sec. 4]

In accord with this constitutional provision, Revised Codes of Montana, 1947, Section 82-1702 authorizes the lieutenant governor to receive the same per diem and mileage as the speaker of the house. During the 1971 Legislature, the lieutenant governor also was authorized actual and necessary expenses, not to exceed $40 a day, when directed by the governor to engage in state service away from Helena [1971 Laws of Montana, Ch. 295]. Finally, Revised Codes of Montana, 1947, Section 82-1703 authorizes the lieutenant governor, when serving as acting governor, to receive the same compensation as the governor; however, during his service as acting governor, the lieutenant governor is not entitled to any other compensation or mileage.

Although the governor's salary may be set by the legislature, Article VII, Section 4 prohibits any salary increase for the governor, lieutenant governor or the five other elective officers during their terms of office. Furthermore, a more general provision [Art. V, Sec. 31] prohibits both increases and decreases in "salary or emolument after . . . election or appointment;"[2] this same section also prohibits extension of the term of any public officer.

Article VII, Section 4 also provides:

> No officer mentioned in this section shall be eligible to, or hold any other public office, except member of the state board of education during his term of office.

It would appear that this statement bars each of the seven elective officials in the executive department from assuming another public office during his term of office. It seems to prohibit any of the seven elective officials from campaigning for election to another public office at a midterm election and from resigning from office in order to secure another public office. However, in numerous instances this prohibition--if that is what it is--has not been observed. No court cases could be found that clarify the provision; perhaps that clarification should be provided by the Constitutional Convention. Such clarification might or might not prohibit elective officials from resigning one public office to assume another after election or appointment to the second office.

First in line of succession to the governorship in Montana is the lieutenant governor. Article VII, Section 14 specifies the conditions under which the "powers, duties and emoluments of the office" of governor devolve on the lieutenant governor "for the residue of the term, or until the disability shall cease." The conditions are:

--Failure of governor to qualify;

--Impeachment of governor;

--Conviction of felony or infamous crime of governor;

--Death of governor;

--Removal of governor from office;

--Resignation of governor;

--Absence of governor from the state;

--Inability of governor to discharge the powers and duties of his office.

Article VII, Section 16 extends the order of succession beyond the lieutenant governor. If both the governor and lieutenant governor are disqualified for one of the specified causes (including absence) or if both offices are vacant, the duties of the governor devolve on the president pro tempore of the senate "until such disqualification of either the governor or lieutenant-governor be removed, or the vacancy filled." If the president pro tempore is incapable of performing the duties of governor for any of the causes applicable to the governor, the duties of the governor devolve on the speaker of the house.[3]

It is a constitutional duty of the lieutenant governor to serve as president of the senate, and he casts the deciding vote in order to break a tie [Art. VII, Sec. 15]. Article V, Section 27 also imposes a constitutional duty on the lieutenant governor as presiding officer to sign, in the presence of the senate, all bills and joint resolutions which have been passed by the legislature. When the lieutenant governor is absent or disqualified, or when he holds the office of governor, the president pro tempore of the senate performs the duties of the lieutenant governor "until the vacancy is filled or the disability removed" [Art. VII, Sec. 15].

Provision for removal of officeholders is found in Article V of the Constitution. The governor and other state and judicial officers (except justices of the peace) are liable to impeachment. Causes for impeachment are specified in Article V, Section 17 as high crimes and misdemeanors or malfeasance in office. Article V, Section 16 vests the power of impeachment in the house of representatives; a majority of all house members is required to impeach. Impeachment is tried by the senate, "and the senators shall be upon oath or affirmation to do justice according to law and evidence;" the chief justice of the supreme court presides when the governor or lieutenant governor is on trial. Concurrence of two-thirds of the elected senators is necessary to convict.

Under Article V, Section 17, judgment in impeachment cases extends only to removal from office and disqualification to hold any other state office. But the impeached person also is "liable to prosecution, trial, judgment, and punishment according to law" whether he is convicted or acquitted on impeachment.

Although each of the constitutional specifications relating to structural provisions affecting the office of the governor is discussed below, a few are of greater significance than others. The most important issues are time of election, the date on which the governor's term begins and the question of succession to the governorship.

QUALIFICATIONS

Qualifications for the office of governor are established in Article VII, Section 3 of the Montana Constitution. In addition, Article VII, Section 4 prohibits the governor during his term of office from holding any other public office (except member of the State Board of Education) and Article VII, Section 1 requires that he reside at the seat of government during his term. The purpose of constitutional specification of requirements with respect to age, citizenship and residency presumably is to assure maturity as well as a competent understanding of the peculiar characteristics and problems of the state. Such requirements have the effect of excluding new residents. One analyst has observed that it is unnecessary to require the governor to meet more stringent age, citizenship and residency qualifications than are required of a voter because practical political factors preclude inexperienced people from attaining the governorship.[4] The Montana Constitution requires that the governor be at least 30 years old, a United States citizen and a Montana resident for two years prior to his election. The Montana Legislative Council in 1968 recommended the repeal of Article VII, Section 3, which sets forth the age, citizenship and residency requirements, and of Article VII, Section 4, which contains the constitutional proscription on dual officeholding.[5]

Age

Advocates of reducing the age requirement for governor contend that the electorate should have the option of selecting a man who achieves a high degree of maturity and excellence at an early age. There are two alternatives available if this argument is persuasive. The age requirement could be set specifically at some point between the legal voting age of 18 and the present age requirement of 30, or the requirement could be changed to permit any qualified voter to hold the office. In view of the recent Twenty-sixth Amendment to the U. S. Constitution and of present qualifications established in Article IX, Section 2 of the Montana Constitution, the latter alternative would allow an 18-year-old United States citizen who had resided in Montana one year immediately preceding election to become governor. Proponents of this alternative might argue that voters should be able to elect whomever they want and that if one is old enough to vote for governor, he should be given the opportunity to hold the office.

Opponents of reducing the age requirement argue that an older man has the benefit of longer experience and better judgment--characteristics to be desired in a governor. Those in accord with this position would retain the present age requirement, or would set it even higher than 30.

U. S. Citizenship

Few if any arguments can be advanced to eliminate the requirement of United States citizenship. Nevertheless, eleven states do not require their governors to be U.S. citizens.[6]

State Residence

There are three alternatives which might be presented regarding the state residency requirement for Montana's governor. The present two-year requirement might be retained; the requirement might be increased to more than two years, or it might be changed to correspond to voter qualifications. Those who would increase the requirement argue that more than two years is required to understand the complexities of the state. Conversely, those who would reduce the requirement argue that governmental affairs within the United States are similar enough that experience in one state can be applied in another. In addition, the arguments advanced above may be applied here as well--that the electorate should not be restricted in making its selection, and if a person is qualified to vote, he is qualified to run for the office.

Other Specifications

In addition to the age, citizenship and residency requirements provided in Article VII, Section 3, the Constitution sets forth other specifications in Article VII, Section 4 and Article VII, Section 1 which affect the office of governor.

Not all state constitutions contain a prohibition on dual officeholding such as is found in Article VII, Section 4 of the Montana Constitution. This fact indicates that such a provision is not necessarily fundamental and need not be included in a constitution. However, if such a provision is retained, it probably should be clarified to remove doubts as to whether an elective officeholder in the executive department may resign the office and seek or be appointed to another during his term of office.

Constitutionally requiring the governor to reside at the seat of government has been criticized as being unnecessary and potentially troublesome.[7]

TIME OF ELECTION

Presently, Montanans elect their governor at the same time they vote for the President of the United States. Some commentators believe this concurrent election might result in a "coat-tail" effect whereby a popular presidential candidate may carry his party's state ticket into office with him. It

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also is possible that a popular gubernatorial candidate may help swing his state's electoral vote to the presidential candidate of his party. The coat-tail effect theory cannot be proven; the most that can be said is that the presidential race seems to influence the gubernatorial race in two-party states, especially if there is a change in national party control.

Of the twenty concurrent presidential and gubernatorial elections held in Montana, the state in twelve of them delivered its vote to presidential and gubernatorial candidates of the same party; on eight occasions, the state engaged in split-ticket voting and elected a governor of one party while giving its electoral vote to the presidential candidate of the other party. In the last eight elections, the state was consistent in four (1948, 1952, 1956 and 1960) and engaged in ticket-splitting in four (1940, 1944, 1964 and 1968). The situation has been summarized as follows:

> Whether one race affects the other, and how much, is not susceptible to exact proof. Separation of the two elections would, however, eliminate the opportunity for a coat-tail effect.[8]

Another argument for separating state and presidential elections is that issues and personalities of the state race are obscured by the presidential race. A non-presidential election year could focus on state issues and perhaps thereby contribute to the strenghtening of state government. But opponents of separating state and presidential elections argue that voter turnout is significantly higher in presidential election years than in off-year general elections, and that this higher turnout provides a clearer mandate from the voters. Furthermore, current off-year elections do not completely separate state and national issues either, because congressmen and United States senators also are elected at that time.

Separation of national and state issues could be achieved most completely by shifting state elections from even to odd years, thus separating them from U.S. senatorial and congressional as well as presidential elections. But odd-year elections would result in additional expenses, and the criticism of reduced voter turnout would be applicable.

In addition to the question of separation of state and presidential elections, Article VII, Section 2 must be examined to determine whether the details of settling a tie vote should be statutory rather than constitutional. The Legislative Council in 1968 recommended that Section 2 be revised to simplify and clarify its intent in regard to selection of a constitutional officer by the legislature.[9]

TERM OF OFFICE

Article VII, Section 1 establishes the four-year term of office. Approximately a fifth of the states still limit their governors to two-year terms; however, it would seem there would be little controversy in Montana regarding length of the governor's term of office because the four-year term has existed since the 1889 Constitution was ratified. The four-year term instituted by the drafters of that document was one of the few changes made in the executive article from the 1884 Constitution, which provided for a two-year term of office [Art. V, Sec. 1].

The primary argument in support of the longer term is that it gives the governor time to focus his energies on developing and implementing his legislative and administrative programs and policies, yet is short enough to force accountability to the electorate without making the governor devote an undue proportion of his time to campaigning for re-election. On the other hand, proponents of the shorter term desire to make the governor accountable to the electorate at more frequent intervals.

No state has a term of office other than two or four years; nevertheless, some consideration might be given to increasing the governor's term of office to five or six years.

Although Montana has no limitation on the number of terms a governor may serve, some states do impose such a limit because of the advantages of incumbency to a candidate and the consequent fear that a strong governor may develop an unhealthy ability for self-perpetuation in office. The limits in other states take four forms: ban on immediate succession; limit to two successive terms; absolute limit of two terms, and ban on service during a prescribed period after a specified number of terms.

An argument against limits on terms served is that they restrict the people's choice by eliminating the one candidate who is the most experienced and about whom voters are likely to be most knowledgable. In addition, such limits prevent the electorate from directly expressing its judgment on the performance of the past administration.

As with length of term of office, it would seem that the question of limitation on number of terms may not become a controversial issue in Montana. The state has functioned since 1889 without such a limitation, and in 1951 a constitutional amendment which would have limited the governor to two consecutive terms was killed in the legislature.[10]

Indeed, Montana's history is largely one of successive gubernatorial service. Only three of Montana's governors who sought election to second terms were defeated--Joseph Dixon in 1924, Roy E. Ayers in 1940 and John Bonner in 1952. Technically, Tim Babcock also was defeated in his bid for a second term in 1968; however, Babcock had served as acting governor for much of Donald Nutter's unexpired term before being elected governor in 1964, and the people undoubtedly thought of him as the governor during this time.[11] In addition, one governor--Sam C. Ford in 1948--was defeated in a bid for a third consecutive term.

Joseph K. Toole, the first governor of the state, served to the end of his term on January 2, 1893. He did not seek re-election at that time, but was elected again in 1900 and 1904. Although Toole did not complete his final term, resigning April 1, 1908, he was elected to three terms, the latter two successive. John E. Erickson also was elected to three successive terms. However, he served only from 1925 to 1933, when he resigned to become U.S. senator.

Three governors have been elected to and served two consecutive terms: Sam V. Stewart from 1913 to 1921; Sam C. Ford from 1941 to 1949, and J. Hugo Aronson from 1953 to 1961. In addition, two lieutenant governors served as acting governor for part of a gubernatorial term and then were elected to the governorship in their own right: Edwin L. Norris served the remainder of Joseph K. Toole's term and was elected governor in 1908; Tim Babcock, following Donald Nutter's death in an airplane crash in January of 1962, completed Nutter's term and was elected governor in 1964.

Another important issue concerning the governor's term of office is the date of commencement. The plight of an incoming governor is outlined by the Committee for Economic Development as follows:

> The governor is normally inaugurated early in January, following a November election. He is expected to go before his legislature almost immediately to present his programs and plans for action for the ensuing year or biennium. Without advance access to the resources of any line department, facing the machinations of competitive independently elected executive officials, and lacking any central planning staff or a strong budgetary unit, he can hardly be expected to make effective use of this opportunity to discuss state problems with his legislature, face to face. Neither is he capable of delivering an authoritative "state of the state" message to the citizens--a responsibility each governor should fulfill annually.
>
> To overcome these limitations, each incoming governor needs two or three months in office before the first regular legislative session opens.[12]

The Montana Constitution [Art. VII, Sec. 1] provides that the governor's term of office begins the first Monday of January following the election. It has been proposed that the governor should take office earlier--perhaps in December-- so he might assume responsibility for budget preparation and make other arrangements for the upcoming legislative session.[13] But advancing the inaugural date of the governor might leave too little transitional time during which the incoming governor could assemble his staff; a 1969 law might achieve the goal of adequate preparation more rapidly. 1969 Laws of Montana, Chapter 47 directs that the governor-elect "and his necessary staff" be provided with office space in the Capitol; the law provides for compensation for the staff and for assignment of state personnel to the governor-elect. However, it does not guarantee transfer of records from the outgoing administration, briefing of staff on routine office procedures or participation in budget preparation for the upcoming biennium--devices which are recommended to aid the smooth transition from one administration to another.[14]

The constitutions of Hawaii [Art. IV, Sec 1] and Alaska [Art. III, Sec. 4] provide that the governors begin their terms of office in December. Nevertheless, consideration must be given to the argument that advancement of the inaugural date might unduly shorten the time between election and inauguration when election results can be contested.[15]

An alternate might be to retain the present inaugural date of the governor and postpone the legislative session for one or two months. Such a proposal would achieve the goal of lengthening the period during which the incoming governor can prepare for the legislative session, and it would avoid the issues set forth in opposition to advancing the inaugural date.

COMPENSATION

Although Article VII, Section 4 sets the original salary of the governor, the introductory clause, "Until otherwise provided by law," renders this portion of the section obsolete; the governor's annual salary is presently set at $25,000 [Revised Codes of Montana, 1947, Sec. 25-501]. Indeed, the Legislative Council in 1968 concluded that the entire Section 4 is obsolete and should be repealed.[16]

As noted in the introductory portion of this chapter, Article VII, Section 4 prohibits any increase in salary of the governor or lieutenant governor during his term of office. In addition, Article V, Section 31 prohibits both increases and decreases in salary of public officers after election or appointment. In Poorman v. State Board of Equalization [99 Mont. 543, 550, 45 P.2d 307 (1935)] the Montana Supreme Court declared that the general provision contained in Article V, Section 31 is controlling, and that it "renders all other prohibitions in the Constitution contained mere surplusage."

The Convention should consider whether it will retain a general provision concerning compensation of all public officers and eliminate all other constitutional restrictions, whether it will eliminate the general provision and retain only specific provisions, or whether it will eliminate all constitutional restrictions on increases or decreases in compensation.

Generally, lack of constitutional specifications in regard to compensation of public officials is considered commendable. Thus, most observers agree that salaries should not be specifically provided in (and thereby frozen by) the constitution. However, the purpose of constitutional limitations on increasing or decreasing salary during a public officer's term of office should be considered. Another Montana court case, State ex rel. Jackson v. Porter [57 Mont. 343, 347, 188 P. 375 (1920)] declared that the purpose of such limitations is to "remove from the lawmakers the temptation to control the other branches of government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salaries."

SUCCESSION TO THE GOVERNORSHIP

There are two basic aspects which must be considered as components of the issue of succession to the governorship: questions of when succession occurs and of who succeeds to the governorship.

When Succession Occurs: Temporary vs. Permanent Disability

Montana's Constitution does not distinguish between temporary and permanent disability. Thus, the State Supreme Court declared, in State ex rel. Lamey v. Mitchell [97 Mont. 252, 256, 34 P.2d 369 (1934)], that (1) no vacancy exists in either the office of governor or of lieutenant governor when the governor is absent from the state or physically unable to discharge the duties of his office (temporary disability), and (2) that no vacancy exists even when the governor resigns or is permanently removed from office (permanent disability).

In contrast, it has recently been observed that

> our state . . . constitutions must be amended to recognize the basic difference between temporary and permanent disability . . . . "In cases of permanent disability, the alternate succeeds to the office of chief executive" . . . It follows that in cases of temporary disability . . . the alternate should be considered as a "substitute" or "deputy" until the disability shall be removed or become permanent.[17]

Under the above-cited court case, Montana's lieutenant governor becomes acting governor in the event of both permanent and temporary disability; he does not succeed to the office of governor in the event of permanent disability of the governor, but remains the occupant of the office of lieutenant governor "holding" the office of governor:

> Neither do we think that upon resignation, death or permanent removal of the Governor there is a vacancy in the office of Lieutenant-Governor. In any such event he, as Lieutenant-Governor, shoulders immediately the duties of Governor, and while "he holds the office of governor," the president pro tempore of the senate peforms the duties which theretofore devolved upon the Lieutenant-Governor. When the duties, powers

> and emoluments of the office of Governor devolve upon the Lieutenant-Governor, it cannot be said that he vacates his office of Lieutenant-Governor, and, unless he does so, there is no vacancy in his office. His assumption of the duties of the office of Governor does not create . . . a vacancy, as he is discharging the functions of the Governor by the mandate of the Constitution, and that by reason of being Lieutenant-Governor. If the framers of the Constitution had intended that there should be a vacancy in the office of Lieutenant-Governor upon the resignation, death or permanent removal of the Governor, they could have easily said so [emphasis supplied] . . . .
>
> It would be idle to say that upon the resignation of the Governor there was thereby created a vacancy in the office of Lieutenant-Governor, in view of the specific language of sections 14 and 15 . . . . If that be true, then the Lieutenant-Governor, upon assuming the powers and duties of the Governor, would be entitled to appoint a Lieutenant-Governor . . . .
>
> Then, again, if the Governor were absent from the state or unable temporarily to perform the duties of his office, it could hardly be argued that while the Lieutenant-Governor was discharging the duties of the office of Governor, he could appoint a Lieutenant-Governor. In such case, the "disability" of the Governor may cease at any time, and he thereupon assumes the duties of his office.[18]

Richard H. Hansen suggests that the powers and duties of the office of governor be differentiated from the office itself. The powers and duties of the office (but not the office itself) would devolve upon the alternate in the event of temporary gubernatorial disability; on the other hand, the alternate would gain the office of governor, with all its "powers, duties and emoluments," in the event of permanent disability of the governor.

> The legal rationale could be explained simply . . . . Upon inauguration, the executive is vested with two rights. The first is the right to his term of office, and such right is subject to termination only by death, resignation, conviction by impeachment, or permanent disability. The second right is that of exercising the powers and duties of the office. This is a contingent right, subject to temporary suspension in the state's interest, in case of temporary inability, or pending the determination of impeachment proceedings.[19]

The Convention should give consideration to constitutionally distinguishing between permanent and temporary gubernatorial disability. Thus, a new constitution might specify that in the event of the governor's death, resignation or permanent removal from office, the office of governor becomes vacant, and his alternate succeeds to the office. Succession would be permanent; the alternate becomes governor, so the alternate's office is also vacated.

In cases of temporary disability, however, the constitution might specify that the alternate serves as acting governor, and only the powers and duties of the office of governor (not the office itself) devolve on the alternate until the disability is removed.

When Succession Occurs: Gubernatorial Disability

Although Montana's Constitution provides for succession to the governorship, in cases of "inability" of the governor "to discharge the powers and duties of his office" [Art. VII, Sec. 14], procedures for determining disability of the governor are not provided. Unfortunate experiences in several states with disabled governors (Illinois, Louisiana, Nebraska, New Hampshire and North Dakota) and federal experience with presidential disability illustrate that gubernatorial disability might be cause for concern.[20]

It has been proposed that a comprehensive provision on gubernatorial disability might include three components: (1) definition of disability; (2) provision for referral of question of disability, and (3) provision for determination of the existence of gubernatorial disability.[21] Such a provision would outline what disability is and how it is determined.

The present Constitution uses the terms "inability," "disability," and "disqualification" almost interchangeably, thus confusing their precise application. Uniformity of terminology is desirable to eliminate confusion, imprecision and ambiguity. One observer has suggested consistent use of the term "disability" rather than "inability" because to some the term "inability" suggests a lack of intellectual as well as physical or mental capacity.[22]

Most authorities agree that construction of the term "disability" should be inclusive and broad, rather than restrictive and narrow. They therefore hesitate to specifically define the term constitutionally.[23] But perhaps a constitutional definition of "disability" as "any condition or circumstance, including impeachment and physical or mental disability, that renders the governor unable to discharge the powers and duties of his office"[24] would be sufficiently far-reaching to cover all contingencies.

Gubernatorial Absence

A question related to gubernatorial disability is that of gubernatorial absence from the state. It has been the practice in Montana to construe the term "absence" literally, so that the governor's absence from the state immediately results in temporary devolution of the "powers, duties and emoluments of the office" upon his successor. The primary reason for such a practice has been identified as "earlier conditions of travel and communication which prompted concern over the real possibility of extended gubernatorial absences."[25] However, such conditions no longer exist:

> Under modern conditions, mere absence from the state should no longer require a transfer of executive authority. A governor can quite effectively control the affairs of the executive by telegraph and telephone . . . . Only when continuous absence results in failure to discharge the duties of the office, whether such absence be from the state or not . . . should temporary succession be required.[26]

Indeed, even the absence of the President from the United States does not activate succession on the national level. Furthermore, the governor need not be prohibited from requesting his successor to act in his absence if the governor believes temporary succession is necessary.[27]

Further arguments invoked against temporary succession immediately upon gubernatorial absence are that (1) it is increasingly necessary for governors to travel to transact official business with the federal government and with other states, and (2) such temporary succession provides "frequent opportunity for political opportunism and for mischief" on the part of the successor "especially with respect to the conduct of state affairs in a manner contrary to the governor's policies."[28]

On the other hand, the primary argument for retaining the present arrangement of temporary succession during the governor's absence is that it might tend to discourage long and frequent gubernatorial absences.

In addition to those states in which temporary succession takes place upon the governor's absence as it does in Montana, there are states with a more flexible approach. The courts of New Jersey and Louisiana have limited "absence" to only that absence which injuriously affects the public interest of the state. The New Hampshire Constitution provides for temporary devolution of gubernatorial powers on the succeeding officer during gubernatorial absence, while at the same time retaining in the governor "power and authority to transact" official business while out of state. Alabama allows its governor to be absent from the state twenty days before succession becomes operative.[29]

Procedures for Determination of Gubernatorial Disability

Relatively few states outline procedures for determination of gubernatorial disability, and procedures established in those states vary considerably. Examination of disability determination provisions suggests two conclusions of importance to Montana: (1) disability determination provisions should be applicable to both physical and mental disability, and (2) disability determination should not be limited to determining the existence of a vacancy in the office of governor, but should authorize findings of temporary disability as well. Temporary disability provisions allow the elected governor to resume the powers and duties of his office after the temporary disability has passed, and thus make it more likely that a governor will be amenable to declaring his temporary disability. It was in recognition of the fact that the President of the United States might be temporarily unable to perform the duties of his office, even while his permanent removal would be undesirable, that the Twenty-fifth Amendment to the U.S. Constitution was passed.

That amendment permits the President to declare himself disabled by transmitting a written declaration of his disability to the president pro tempore of the Senate and to the speaker of the House of Representatives. In the alternative, the vice president and a majority of the members of the cabinet (or of another body named by Congress) may transmit such a declaration. The vice president becomes acting president during such disability. Following the same procedure, resumption of powers is initiated by the President. If resumption is challenged by the vice president and a majority of the cabinet (or another body named by Congress), a vote of Congress resolves the dispute.

It might be appropriate to follow the precedent of the Federal government and the governments of a few states in allowing the governor to declare his own disability. Because the legislature is not always in session, the declaration of disability might be filed with the secretary of state. An alternative to gubernatorial declaration of disability also may be desirable; it is here that the state provision might depart from the federal example. Montana has no semblance of a cabinet such as that on the national level; thus, to attempt to adopt the federal procedure in its entirety would be inappropriate.

Most state provisions for disability determination include two similar parts: (1) the question of disability may be raised by an official or an official body, and (2) the determination of gubernatorial disability is made by a separate body.[30]

Methods of raising or referring the question of disability include referral by any two officials named in the order of succession, exclusive of the official next in line of succession; referral by the official who would succeed to the governorship or by the chief justice of the state supreme court; referral by four elective officials who are cabinet members; referral by two-thirds or three-fifths vote of the legislature; referral by designated legislative leaders; referral by the secretary of state, and referral by special commission.

Although it has been contended that the officer next in line of succession may, "by a well-known principle of law," initiate disability determination proceedings,[31] the propriety of such action is subject to question. Furthermore, "a constitutionally designated successor may be reluctant to assert claims to office or to exercise its powers."[32] The suitability of one-man initiation also has been questioned.[33]

There are four procedures used for determination of vacancy or gubernatorial disability, in addition to determination by the governor himself. These are: (1) determination by the state supreme court, usually by majority vote of the supreme court justices; (2) determination by majority or two-thirds vote of the legislature; and (3) determination by an elective attorney general, the president pro tempore of the senate and the speaker of the house, and (4) determination by a special board.

The states of Iowa, Nebraska and Oregon by statute use the fourth alternative. The chief justice, the state mental health administrator and the dean of the state medical school are the members of the board. Disability is determined by secret ballot and unanimous vote.[34] The Missouri Constitution [Art. IV, Sec. 11 (b)] also provides for a disability board, composed of elective officials.

One observer has suggested that another method to determine gubernatorial disability might be to designate certain officials in the legislative, administrative and judicial branches of state government as the determining body. He concludes:

> [T]he determining body might be empowered to act upon its own initiative. Another possible solution would be to permit any citizen to institute such an investigation. This latter suggestion is subject to the objection that it might open the chief executive to the harassing actions of his political opponents, but these might be avoided by requiring a waiting period of several months between any two such actions.

> Initiation by a citizen probably should be made possible under any of the other methods by making available an action for a writ of mandamus compelling the designated official or officials to act.[35]

Although some observers contend that disability determination by any department other than the executive is a violation of the concept of separation of powers,[36] the states which provide disability determination procedures do utilize the other two branches of government. Indeed, it would not seem inappropriate to involve both legislative and judicial branches of government in the determination of gubernatorial disability, perhaps by designating the legislature as the referral agency and the supreme court as the determination agency. If professional competency is desirable, an advisory board composed of psychiatrists and physicians might be established.

In addition to determination of the existence of gubernatorial disability, disability determination provisions also probably should include procedures for the removal of gubernatorial disability. It may be proper to vest in the governor the right to declare the termination of his disability and his ability to reassume the powers and duties of the office. If there is no challenge to his declaration, the governor could resume the powers and duties; however, there probably should be provision for authorizing a challenge to the governor's declaration.

The challenge procedure might parallel the procedure for disability determination. Thus, the agency or individual authorized to raise and refer the question of gubernatorial disability might be authorized to challenge the governor's resumption of power, and the same agency authorized to determine gubernatorial disability might determine the termination of the disability as well. Under the Florida Constitution, the governor or the legislature, as well as four cabinet members who are authorized to refer the question of gubernatorial disability to the supreme court, may suggest that the gubernatorial disability has terminated, whereupon the supreme court makes the determination of the removal of gubernatorial disability [Art. IV, Sec. 3(b)]. The Florida example of vesting initiation procedures for removal of gubernatorial disability in the legislature as well as in the agency authorized to refer the question of gubernatorial disability might be expanded by authorizing the acting governor also to initiate such procedures. The acting governor also might be authorized to challenge the governor's resumption of powers.

If no referral agency or individual is established as part of the disability determination procedure, the agency established to determine gubernatorial disability might be authorized to challenge the governor's resumption of powers; the procedure for final resolution probably must then diverge from the procedure for disability determination. For example, the Twenty-fifth Amendment to the U. S. Constitution provides that the President makes the determination of when his disability has ended unless he is challenged by the vice president and a majority of the cabinet (or another body named by congress); thus, the vice president and the cabinet, who have authority to determine presidential disability, are authorized to challenge the presidential resumption of powers. At this point, Congress becomes part of the procedure by resolving the dispute. A two-thirds vote of both houses is necessary to retain the vice president as acting president; therefore, if one-third plus one of the senators and representatives agree with the President, he may resume the powers and duties of his office. Similarly, the governor of Massachusetts is authorized to determine the termination of vacancy in his office unless challenged by the agency authorized to determine gubernatorial disability. If challenged, the legislature becomes part of the process, deciding the dispute in the same manner as at the national level [Mass. Const. 91st Amend]. Virginia modifies the procedure by requiring a vote of only one-fourth plus one in each house to authorize the governor to resume his powers and duties; perhaps such a provision is appropriate in Virginia, because only a majority vote of the total membership of the legislature is required as one of the methods of making the determination of gubernatorial disability [Virginia Const. Art. V, Sec. 16].

Three states--North Carolina, Maryland and Michigan--have designated the same official or official body to determine both disability and its termination. In North Carolina, only the governor may declare his physical disability and subsequently his physical capacity. Mental disability is determined solely by the legislature. A two-thirds vote of all members of both houses establishes mental disability; a majority vote removes the disability [North Carolina Const. Art. III, Sec. 12]. Although Maryland [Art II, Sec. 6 (c)] and Michigan [Art. V, Sec. 26] constitutionally provide for initial referral by separate authority of the question of gubernatorial disability to the supreme court for determination, the court is vested with the initiative to determine termination of disability.

The Convention will probably consider the advisability of constitutionally specifying the procedures by which disability is to be determined. The states of Nebraska, Iowa and Oregon statutorily provide for disability determination but because the constitutions of those states do not authorize such legislative action, some observers believe that the statutes are unconstitutional in that they violate separation of powers.[37] On the other hand, the constitutions of Texas and Alaska direct the legislature to provide for disability determination but no such legislation has been enacted.[38]

Who Succeeds to the Governorship

Article VII, Sections 14 and 16 establish the line of succession to the Montana governorship to be, in order, lieutenant governor, president *pro tempore* of the senate and speaker of the house.

The necessity for constitutional determination of the line of succession beyond the first successor has been questioned;[39] an alternative is to constitutionally provide for only a single successor, authorizing the legislature to provide for further succession.

Almost all states now make the lieutenant governor first in the line of succession. A few states, however, do not provide for a lieutenant governor, and the president of the senate or the secretary of state is first successor.

Opponents of succession by legislative leaders question the legitimacy of a legislator--chosen from one district to represent only a small segment of the state population--exercising the powers and duties of the governorship. They also point out that succession by a legislator may result in a change in party control of the executive office.

Devolution of the powers and duties of the governorship on the president *pro tempore* of the senate for other than a short time has occurred only once in Montana. Although this instance did not result in change in the political complexion of the administration, the possibility for such reversal has occurred twenty-eight times. Thus, of the forty-one legislative sessions since 1891, both houses of the legislature were controlled by the party in opposition to the governor eleven times and during seventeen additional sessions, one of the houses was controlled by the opposition party--the senate for eleven sessions and the house of representatives for six.

Proponents of the lieutenant governor as first successor contend that the successor to the governor should be elected on a statewide basis so he is responsive to all the voters of the state. Some observers, however, question the need for an office of lieutenant governor.

The Office of Lieutenant Governor

Criticism of the office of lieutenant governor may be summarized as follows:[40]

--The office seldom bears a significant share of state administrative responsibilities.

--The lieutenant governor is not truly an executive officer.

--The office tends to attract mediocre persons who are usually poorly compensated.

--On the whole it is an unnecessary "fifth wheel."

Critics of the lieutenant governorship claim the position carries neither power nor prestige, except for the possibility of elevation to the governorship. Two quotations illustrate the criticism levelled against the office:

> [G]enerally few useful duties may be found [for a lieutenant governor] other than to stand by . . . .[41]

> [T]he plain truth of the matter is that the lieutenant governor has not become the assistant governor and in most instances not even an assistant to the governor; this despite the fact that state government and governors are increasingly vexed by the need to coordinate

> the sprawling executive establishment and by the need for administrative supervision. What is done along these lines of management control is done by executive assistants or administrative directors appointed by the governor and responsible to him. They compose his executive office, but the lieutenant governor is not included.[42]

Those who favor retention of the office of lieutenant governor argue that the people should elect an individual for the express purpose of "standing by" to succeed to the governorship, and that the office of lieutenant governor thereby provides an element of stability vital to state government. Furthermore, the proponents declare, no state has abandoned the office since 1867[43] and six states have seen fit to incorporate the office into their governmental structures since the turn of the century--two since 1968. A total of forty-two states now maintain the office. Finally, in most states the office provides a permanent presiding officer for the senate without depriving any district of its senator.[44]

The function of the lieutenant governor as presiding officer of the state senate is, of course, only a secondary function. His primary purpose is to serve as direct successor to the governor. Some states have assigned the lieutenant governor additional responsibilities, as in membership on various administrative boards and commissions and the legislative council. Thus, the lieutenant governor performs both executive and legislative functions, "something of a hybrid position."[45] Most criticism of the office and most proposals to improve it are directed toward the executive aspect of the office. However, at least one observer has suggested that the legislative aspect of the office may make it more important than is usually recognized. He cautions against hasty attempts "to make something new of this office" and suggests that it

> may well be that the office has become truly important to the processes of state government in those states where it has long existed, and state and party officials have come to depend upon it to perform important political functions.[46]

Nevertheless, the lieutenant governor's duty to preside over the senate may cause friction when the lieutenant governor and the senate majority are of opposite parties,[47] and proposals have been advanced to change the office of lieutenant governor:

> There is a noteworthy trend toward giving . . . the lieutenant governor official duties in the executive branch. There is need for careful reconsideration of the place these officers should have in the governmental scheme . . . . He should be shorn of his traditional ex officio function of serving as the presiding officer of the Senate--a post carrying with it comparatively little power . . . and freed to participate in the executive councils and to accept such administrative and representational duties as the chief executive might choose to assign him . . . . The character of his duties should be kept flexible . . . A series of different assignments over a period of time would enable him to acquire a wider knowledge of the operations of the government as a whole. In this way he could be given a better opportunity than at present to prepare himself for the responsibility of serving as chief executive in case fate should thrust that role upon him.[48]

That discussion leads to the question of whether the duties of the lieutenant governor should be constitutionally provided or whether they should be left to the discretion of the legislature or the governor.

Presently, the Montana Constitution delegates to the lieutenant governor the duty to serve as president of the senate and further provides that he "shall vote only when the senate is equally divided" [Art. VII, Sec. 15]. The Constitution also provides, in Article V, Section 24, that "No bill shall become a law except by a vote of a majority of all the members present in each house." In some states, such provisions have been held to exclude the lieutenant governor from exercising his tie-breaking power on substantive legislation. However, the Montana Supreme Court has ruled, in State ex rel. Easbey v. Highway Patrol Board [140 Mont. 383, 372, P.2d 930 (1962)], that Article V, Section 24 is a general provision while Article VII, Section 15 is the more specific provision and is therefore controlling. Thus, Montana's lieutenant governor has the power of breaking ties on substantive legislation. Moreover, it would appear from the language of the decision that the tie-breaking power is not discretionary with the lieutenant governor, but mandatory. The court said that

> when the senate is equally divided by reason of a tie vote, it is then and there that the Lieutenant Governor is expressly empowered, permitted and directed to step in, take over and cast the deciding vote either for or against the bill, resolution, question or proposition being voted upon.[49]

If the Constitutional Convention decides to retain the office of lieutenant governor but wishes to make its functions more flexible, constitutional specification of the duties of the lieutenant governor could be deleted and left to determination by the legislature and possibly the governor. Such deletion of constitutional specification would not necessarily result in cessation of the lieutenant governor's function as president of the senate, for such a duty might be imposed by legislation; similarly, the power of the lieutenant governor to cast the deciding vote might be legislatively provided, or might be left to the discretion of the senate as reflected in its rules of procedure. Constitutional authorization for the legislature (and perhaps for the governor) to determine the functions of the lieutenant governor would facilitate increased flexibility in the office of lieutenant governor; under the present constitutional provisions, whereby the lieutenant governor is elected statewide and is not subordinated to either the legislature or the governor, it is questionable whether either can require that the lieutenant governor perform any duties other than those relating to his position as president of the senate.

A further consideration, if the duties of the lieutenant governor are eliminated from the constitution, is whether the legislature only should be authorized to determine the powers and duties of the office, or whether this power might be vested in the governor also. Arguments in favor of gubernatorial delegation are:[50]

--The lieutenant governor could be more effective by being allowed to exercise functions that normally would not be delegated to him by the legislature.

--Authorizing the governor to delegate ministerial and routine duties to the lieutenant governor would add to the efficiency of the executive branch.

--It would not detract from the governor's ultimate responsibility but merely would ease the burden of executive branch administration.

--It could enhance the concept of the governor and lieutenant governor as a working team. Imprudent delegation would be unlikely, particularly if it would increase the political stature of the lieutenant governor to the disadvantage of the governor.

Arguments in opposition to gubernatorial delegation are:[51]

--It would create indirectly a two-headed executive and would relieve the governor of his responsibilities and basic rights in the execution of his duties.

--It might encourage the governor to shirk his duty by delegating "messy" jobs, emergencies or crises to the lieutenant governor.

--The governor, as a matter of law, already has ample authority to delegate purely ministerial duties.

If the office of lieutenant governor is retained in Montana, consideration might be given to electing the governor and lieutenant governor on a joint ticket, thus increasing the likelihood that the programs and policies of the elected governor will not be significantly altered if succession is necessary. The constitution might provide that the governor and lieutenant governor form joint candidacies in party primaries (or in case of independents be selected jointly by petition in a manner prescribed by law), or it might even authorize the gubernatorial nominee to select his own running mate. It would seem that independent selection of nominees for governor and lieutenant governor at the primary election level (as is presently the practice in Montana) would somewhat negate the goal to be achieved by joint selection of the governor and lieutenant governor at the general election level. Following national precedent set forth in the Twenty-fifth Amendment to the U. S. Constitution, Montana also might empower the governor to fill a vacancy in the office of lieutenant governor by appointment, subject to legislative approval.

The proposal for electing the governor and lieutenant governor jointly and having the governor appoint a lieutenant governor when that office is vacant proceeds from the premise that the voters have chosen the governor's program and policies and have a right to expect continuance of those programs and policies by his successor.

In six legislative assemblies since 1957, bills have been introduced proposing joint election of the governor and lieutenant governor, with increasing acceptance on the part of legislators.[52]

Opposition to joint election of the governor and lieutenant governor centers around fears that "ticket balancing" will produce candidates of poor quality for the lieutenant governorship.

Associated Considerations

There are several seemingly incidental, but nevertheless important, questions which must be considered in any comprehensive discussion of succession to the governorship. These cover the problems of vacancy in the alternate's office; delegation of the peripheral duties of the alternate while he fills a temporary vacancy in the executive office; the salary of the alternate when acting as governor, and succession on the death or disability of a governor-elect.[53]

Under judicial construction set forth in State ex rel. Lamey v. Mitchell, permanent accession by the lieutenant governor to the gubernatorial functions does not vacate the office of the lieutenant governor. In fact, the Constitution presently does not provide for filling a vacancy in the office of the lieutenant governor, but instead provides that the duties of the governor devolve on the president pro tempore of the senate or the speaker of the house "until such disqualification of either the governor or lieutenant-governor be removed, or the vacancy filled" [Art. VII, Sec. 16]. Perhaps the governor should be authorized to fill a vacancy in the alternate's office by appointment, subject to the approval of a majority of the legislature. The same arguments attending the question of joint election of the governor and his alternate are applicable to this situation, and such gubernatorial appointment power would seem to make complete the likelihood of continuity of administration during a gubernatorial term of office. The proposal also would eliminate the necessity of calling a special election (see discussion below of tenure of succeeding officer), and would virtually assure that both the office of the governor and that of his alternate would be filled at all times. Authorization of a statutory provision for further succession in the event of coinciding vacancies in the office of governor and of his alternate would cover other contingencies.[54]

Montana's Constitution presently provides for the president pro tempore of the senate to perform the legislative duties of the lieutenant governor when the latter is serving as acting governor [Art. VII, Sec. 15]. Should the constitutionally designated duties of the lieutenant governor be eliminated, however, there would be no need for a constitutional provision delegating his duties while he serves as acting governor. Rather, provision for performance of these peripheral duties could be established by statute or gubernatorial directive.

Some states have experienced difficulty in determining what the salary of an alternate should be when he acts as governor. The present statutory provision which authorizes the lieutenant governor to receive the same compensation as the governor when he serves as acting governor, and that compensation only during such service [Revised Codes of Montana, 1947, Sec. 82-1703], seems to be sufficiently clear.

It is important that there be a constitutional provision relating to succession on the death or disability of a governor-elect. In the absence of such a provision, the courts of at least five states have determined that the incumbent governor should continue in office when the governor-elect is unable to qualify for inauguration; on the other hand, four states have installed the lieutenant governor-elect as acting governor.[55] Disability of the governor-elect and its termination might be determined in the same manner as is provided for determination of the existence and termination of disability of the governor.

Another question which must be considered is that of the tenure of a succeeding officer in filling a gubernatorial vacancy.

> Consideration should be given to a constitutional provision authorizing or requiring the calling of a special election when the executive office is vacant and a substantial portion of the governor's unexpired term remains, especially if succession has become remote from the governor [emphasis supplied].[56]

Thus, the question is whether the successor to the governor succeeds to the office for the remainder of the term, or only until the position is filled by special election. Several states, as well as the Model State Constitution,[57] provide for election to fill an unexpired gubernatorial term. As the above quote suggests, election is probably more important if the successor is not closely affiliated with the governor and his program and policies. As an example, such special election would probably be more appropriate in Montana if the successor were the president pro tempore of the senate or the speaker of the house than if the successor were an alternate elected jointly with, or appointed by, the governor.

The final question the Convention might consider relating to succession to the governorship is whether an extended period of absence or disability of the governor should result in automatic vacancy in the office. The Model State Constitution and a few state constitutions provide for such vacancy after a given period of time, usually six months.[58]

REMOVAL

Impeachment and recall are the two methods presently provided in state constitutions by which state elective officers may be permanently removed from office. Montana's Constitution does not authorize recall, and this discussion of removal will be limited to impeachment of the governor and lieutenant governor.[59] Two questions may be raised:

--Should a simple majority vote of all house members remain as the requirement for starting impeachment proceedings?

--Should the senate remain the tribunal for the trial of impeachments?

Presently, the Montana Constitution authorizes the house of representatives to exercise its power of impeachment by majority vote of all members. In some states, however, an extraordinary majority is required to impeach. Proponents of the larger majority requirement argue that the governor is thereby protected from legislative harassment. Those who would retain the simple majority requirement argue that it gives the legislature a stronger check on the governor and that a requirement of a larger vote might overly protect malfeasance. Moreover, in view of the scant untilization of the impeachment power[60] it would appear that the present provisions do not pose a serious threat of hasty action.[61]

Although the court of impeachment in most states is the senate, trial by the senate has been questioned because of fear that it might be tainted by partisanship and, even worse, might be utilized as a political weapon. Furthermore, opponents declare there is no guarantee that such trial would be conducted by persons experienced in deciding questions of fact and of law. Like some other states, Montana provides for the chief justice to preside at the trial of the governor and lieutenant governor and requires the senators "to do justice according to law and evidence" [Art. V, Sec. 16]. New York, Missouri and Nebraska have gone further in judicializing their impeachment proceedings: in New York, the senate and the court of appeals together compose the impeachment tribunal [New York Const. Art. VI, Sec. 24]; Missouri provides that the governor be tried by a special commission of eminent jurists to be elected by the senate [Missouri Const. Art. VII, Sec. 2] and in Nebraska the supreme court sits as the court of impeachment [Nebraska Const. Art. III, Sec. 17]. The Model State Constitution provides that the tribunal for the trial of impeachments and its procedures be established by law, thereby authorizing legislative specification of the supreme court as the tribunal to hear impeachments or legislative establishment of an entirely new tribunal.[62]

Before changing the impeachment tribunal, however, the Convention should consider the following statement:

> [A]n impeachment in this country, though judicial in external form and ceremony, is political in spirit. It is directed against a political offense. It culminates in a political judgment. It imposes a political forfeiture. In every sense, save that of administration, it is a political remedy, for the suppression of a political evil, with wholly political consequences.[63]

NOTES

1. These qualifications are more stringent than the general qualifications for holding public office found in Article IX, Section 7 of the Montana Constitution. The general provision requires that an officeholder be a resident of the state "at least one year next before his election or appointment" and a citizen of the United States.

2. Article V, Sections 26 and 29 of the Montana Constitution also are concerned with compensation of public officers.

3. Article V, Section 46 of the Montana Constitution, which provides for continuity of state and local government in a period of emergency resulting from a disaster caused by enemy attack, would permit deviation from this succession provision.

4. Bennett M. Rich, *State Constitutions: The Governor* (New York: National Municipal League, 1960), p. 8.

5. Montana, Legislative Council, *The Montana Constitution*, Report No. 25 (Helena, 1968), pp. 33, 35. Cited hereafter as Montana Legislative Council, *Montana Constitution*.

6. Hawaii, Legislative Reference Bureau, *Article IV: The Executive*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 75. Cited hereafter as Hawaii Reference Bureau, *Article IV: The Executive*.

7. Maryland, Constitutional Convention Commission, *Report of the Constitutional Convention Commission* (Annapolis: Office of the Secretary of State, 1967), p. 153.

8. Dawn Clark Netsch, "The Executive," *Con-Con: Issues for the Illinois Constitutional Convention* (Urbana: University of Illinois Press, 1970), p. 153. Cited hereafter as Netsch, "The Executive."

9. Montana Legislative Council, *Montana Constitution*, p. 33.

10. Montana, Legislature, *House Journal of the Thirty-Second Legislative Assembly of the State of Montana* (Helena, 1951), p. 367.

11. W. E. Holt, president *pro tempore* of the senate who completed John E. Erickson's term following the death of Lieutenant

Governor Frank H. Cooney in 1935, was defeated by Roy Ayers in the primary of 1936. However, Holt had never been elected to the governorship.

12. Committee for Economic Development, Research and Policy Committee, Modernizing State Government (New York, 1967), p. 48.

13. National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York, 1963, 1968), p. 67. Cited hereafter as National Municipal League, Model Constitution, 6th ed.

14. Council of State Governments, Gubernatorial Transition in the States (Chicago, 1968), p. 1.

15. Illinois, Constitutional Convention 1970, Committee on the Executive, Synopsis: Proposed Executive Article (Springfield, 1970), p. 26.

16. Montana Legislative Council, Montana Constitution, pp. 33, 35.

17. Richard H. Hansen, "Executive Disability: A Void in State and Federal Law," Nebraska Law Review 40 (1961): 726. Cited hereafter as Hansen, "Executive Disability."

18. State ex rel. Lamey v. Mitchell, 97 Mont. 252, 260, 261, 34 P.2d 369 (1934).

19. Hansen, "Executive Disability," pp. 726, 727.

20. Massachusetts, Legislative Research Council, Report Relative to Determination of Gubernatorial Disability, Unnumbered Joint Order (Boston, 1966), pp. 7-8, 12-13, 16-18 (cited hereafter as Massachusetts Research Council, Gubernatorial Disability). See also Clyde F. Snider, "Gubernatorial Disability," Chicago Law Review 8 (1941): 521-525 (cited hereafter as Snider, "Gubernatorial Disability"); Herbert Brownell, Jr., "Presidential Disability: The Need for a Constitutional Amendment," Yale Law Journal 68 (1958): 189, 193-195 (cited hereafter as Brownell, "Presidential Disability"), and Committee for Economic Development, Research and Policy Committee, Presidential Succession and Inability (New York, 1965) pp. 13, 20-22.

21. Hawaii Reference Bureau, Article IV: The Executive, p. 86.

22. Hansen, "Executive Disability" p. 698.

23. National Municipal League, Model Constitution, 6th ed., p. 75.

24. Ibid.

25. Council of State Governments, Issues in Gubernatorial Succession (Chicago, 1969), p. 7.

26. National Municipal League, Model Constitution, 6th ed., p. 75.

27. Ibid.

28. Hawaii Reference Bureau, Article IV: The Executive, p. 80.

29. Council of State Governments, Issues in Gubernatorial Succession, pp. 6, 7. The Model State Constitution provides for succession only in the event of the "continuous" absence of the governor, and provides that if the gubernatorial absence does not terminate within six months, the office of governor is vacated and must be filled by special election. [National Municipal League, Model Constitution, 6th ed., Sec. 5.08].

30. Ibid., p. 3.

31. Brownell, "Presidential Disability," p. 204. See also National Municipal League, Model Constitution, 6th ed., p. 77.

32. National Municipal League, Model Constitution, 6th ed., p. 74.

33. Hawaii Reference Bureau, Article IV: The Executive, pp. 83, 84; Snider, "Gubernatorial Disability," p. 521; Massachusetts Research Council, Gubernatorial Disability, pp. 19, 21.

34. Council of State Governments, Issues in Gubernatorial Succession, pp. 4-6.

35. Snider, "Gubernatorial Disability", p. 528.

36. Massachusetts Research Council, Gubernatorial Disability, pp. 9, 29; Brownell, "Presidential Disability", p. 199.

37. Hansen, "Executive Disability," p. 725; Snider, "Gubernatorial Disability," p. 528.

38. Hansen, "Executive Disability," p. 724.

39. Albert L. Sturm and Fred S. Steingold, The Executive and Civil Service in the Michigan Constitution (Lansing: Constitutional Convention Preparatory Commission, 1961), p. 8.

40. Ibid., p. 15.

41. National Municipal League, Model Constitution, 6th ed., p. 74.

42. G. Theodore Mitau, *State and Local Government: Politics and Processes* (New York: Charles Scribner's Sons, 1966), p. 142.

43. Hawaii Reference Bureau, *Article IV: The Executive*, p. 14.

44. In Alaska, Florida, Hawaii, Illinois, Maryland and Massachusetts, the lieutenant governor does not preside over the senate.

45. Byron R. Abernathy, *Some Persisting Questions Concerning the Constitutional State Executive*, Governmental Research Series No. 23 (Lawrence: The University of Kansas Governmental Research Center, 1960), p. 18.

46. *Ibid*., p. 19.

47. Kansas, Second Commission on Revision of the Kansas Constitution, *Report to the Governor and the Legislature* (Topeka, 1963), p. 44.

48. Joseph E. Kallenbach, *The American Chief Executive* (New York: Harper & Row, 1966), pp. 234, 235.

49. *State ex rel. Easbey v. Highway Patrol Board*, 140 Mont. 383, 399, 372 P.2d 930 (1962). Also see pp. 406, 408, 409.

50. Hawaii Reference Bureau, *Article IV: The Executive*, p. 14.

51. *Ibid*.

52. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, *Constitutional Amendments 1889-1971*, Montana Constitutional Convention Memorandum No. 2 (Helena, 1971), pp. 50, 52, 54, 56, 58, 64.

53. Hansen, "Executive Disability," pp. 731, 732.

54. Maryland constitutionally provides that the office of governor be filled by the legislature in such an event, and that the governor then nominate a lieutenant governor, subject to confirmation of the legislature. The president of the senate serves as acting governor until the new governor qualifies [Art. II, Sec. 6 (e)].

55. *Ibid*., pp. 710, 711.

56. Netsch, "The Executive," p. 155.

57. National Municipal League, *Model Constitution*, 6th ed., Sec. 5.08 (c). See also Connecticut Const. Art. IV, Sec 18; Georgia Const. Art. V, Sec. I, Para. VII; Massachusetts Const. Amend. LXXXXI; New Jersey Const. Art. V,

Sec. I, 9; Oregon Const. Art. V, Sec. 8; Tennessee Const. Art. III, Sec. 4; West Virginia Const. Art. VII, Sec. 16.

58. National Municipal League, Model Constitution, 6th ed., Sec. 5.08 (b). See also Alaska Const. Art. III, Sec. 12 and New Jersey Const. Art. V, Sec. I, 8.

59. For discussion of recall, see Montana Constitutional Convention 1971-1972, Constitutional Convention Commission, Suffrage and Elections, Montana Constitutional Convention Study No. 11 (Helena, 1971).

60. Impeachment charges were brought against Governor Frank H. Cooney and Secretary of State Sam Mitchell in the 1934 extraordinary legislative session; the impeachment resolution lost 41-50. In addition, Secretary of State T. C. Stewart, in 1927, and District Judge C. L. Crum, in 1918, were convicted of impeachment charges. [Ralph E. Owings, Montana Directory of Public Affairs, 1864-1960 (Ann Arbor: Edwards Brothers, Inc., 1960), p. 142].

61. New York, Temporary State Commission on the Constitutional Convention, State Government, Report No. 14 (New York, 1967), pp. 83, 84.

62. National Municipal League, Model Constitution, 6th ed., p. 63.

63. Wrisley Brown, "The Impeachment of the Federal Judiciary," Harvard Law Review 26 (1912-13): 698.

CHAPTER III

POWERS OF THE GOVERNOR

GUBERNATORIAL SUPERVISION OF EXECUTIVE BRANCH

The governor of Montana shares executive authority with six other elective officials: the lieutenant governor, secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction. The Constitution vests limited appointment power in the governor [Art. VII, Sec. 7], but does not authorize him to remove his appointees. Under Sections 10 and 19 of Article VII and Section 13 of Article XII, the governor has access to information from the officers and departments of the executive branch.[1] In addition, under Article V, Section 30, certain state contracts are subject to the approval of the governor and state treasurer.

A proposal incorporated in a few state constitutions gives the governor additional supervisory authority over the executive branch by empowering him to resort to the courts to force compliance with any constitutional or legislative mandate.[2] Opponents of such a provision argue that it is an unnecessary grant of additional power.

The Long Ballot

Montana's Constitution provides for a plural, multi-headed executive of seven elected state officials [Art. VII, Sec. 1]. In addition, the three-member Board of Railroad Commissioners, ex-officio the Public Service Commission [Revised Codes of Montana, 1947, Sec. 70-102], is made elective by statutory enactment [Revised Codes of Montana, 1947, Sec. 72-101].

Article VII, Section 5 of the Montana Constitution declares that the "supreme executive power of the state shall be vested in the governor." In his thesis on the 1889 Constitutional Convention, John Welling Smurr discusses Section 1 of Article VII, and observes:

> Both the philosophy and the wording of this section conflicted with that of section five, which said that the supreme executive power of the state was vested in the governor alone. It never occurred to the delegates that to surround this luminary

> with six department heads who might be elected from different parties, and by pluralities greater than his own, was to deprive him of his "superior" powers, whatever these might be . . . .[3]

On the other hand, it has been noted that the term "supreme executive power" instead of simply "executive power" implies that the executive power might be divided, and that part of it is vested in the other state officials.[4] In that respect, it might be instructive to note the difference between Montana's Constitution and the United States Constitution. Whereas the United States Constitution reads simply that the "executive power shall be vested in a president of the United States of America" [Art. II, Sec. 1], Montana's Constitution declares that "The executive department shall consist of a governor, lieutenant-governor, secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction" [Art. VII, Sec. 1].

A half-century ago, Governor Joseph Dixon recommended that Montana's executive department be changed:

> Let us nominate and elect the Chief Executive of the State, then give him full power to name his assistants in administering the various departments of the state government, and we will know exactly where to place our finger in locating blame or praise.[5]

Studies conducted of Montana state government by legislative groups also have noted the effect of a large slate of elected officers on the power of the governor. The Joint Committee on State Governmental Organization reported to the 1941 Legislature that:

> So far as elective officers are concerned, (six outside of the governor) it is impossible for the Governor, or any other body, to exercise control over them, since they are responsible to the voters of the State, rather than to the Governor . . . . Present day administrative reorganization is providing for fewer elective officers, usually only three including the Governor.[6]

In 1962, the Montana Legislative Council recommended consideration of the principle that the "governor's authority over the executive branch should be implemented by eliminating most elective administrative officials."[7]

Proponents of eliminating the elective status of all state officials except the governor and lieutenant governor declare that a shortened ballot would result in increased accountability to the public, increased efficiency in administration and a reduction in voter confusion at the polls.

Probably the most significant argument in favor of making the presently elective state offices appointive by the governor is that such appointment power would make the governor clearly responsible for all action taken during his administration and he alone therefore would become directly accountable to the people. The present situation is that the elective status of state officers makes them independent of the governor; responsibility is diffused among all the state officers and accountability can be fixed upon no one of them. Appointive officers would fix responsibility directly upon the governor and eliminate "buck-passing" between state officials, it is contended. The point has been well stated in two studies:

> [T]he surest accountability is to give the governor the powers to carry out his responsibilities, focus attention on his discharge of those responsibilities, and then hold him strictly accountable.[8]
>
> [T]he ultimate "watchdog" responsibility lies with the people, a responsibility much easier to discharge if only the governor is responsible for the operation of the state government.[9]

Not only does the long ballot result in diffused responsibility, the governor's lack of clear authority over administrative officials impedes effective administration and unity of management.[10]

Another argument against the long ballot is that it results in voter confusion. The voter is unable to become fully informed on many candidates and offices and he therefore loses interest and effective control over the state government. The validity of this argument is supported by a study of a hotly contested Michigan election which revealed that two weeks before the election 15 percent of those questioned professed complete ignorance about nine major state offices, 40 percent were so uninformed they did not know whether the offices were elective or appointive, and 83 percent did not know the name of the incumbent officeholder.[11]

Furthermore, proponents of the short ballot argue that state offices other than governor and lieutenant governor are essentially administrative and often technical in character and that voters cannot be expected to judge whether candidates possess the requisite qualifications for these offices. Gubernatorial selection of administrative officials, they argue, brings into the public service highly qualified individuals who might not be willing to submit to the rigors of an election campaign to obtain the office.

Finally, opponents of the long ballot argue that independently elected officials may use their offices as bases to campaign against the governor and to obstruct the administration of his policies and programs. In addition, they contend that elected officials face more conflicts of interest than appointive officers because they are obligated to those who contributed to their campaigns and because they must be concerned with receiving support at future elections.

On the other hand, arguments in favor of the long ballot stem from fears of centralized authority and an overly powerful single executive and belief that responsibility in government is best achieved by direct election of state officials. Proponents of the long ballot argue that by giving state officials a mandate from the people, popular election increases the respect and prestige of those offices. The existence of several elective offices should tend to attract young and aggressive candidates, they reason, which in turn should enlarge popular interest and participation in government. They decry appointive offices, fearing that gubernatorial appointments might be influenced by political considerations. Finally, they believe that state offices should remain elective so the incumbents might receive training for higher electoral responsibilities.

Appointment Power

Article VII, Section 7 of the Montana Constitution vests in the governor "by and with the consent of the senate" the power to appoint "all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for." The section also provides that in case of a vacancy the governor shall appoint to these offices "some fit person to discharge the duties thereof until the next meeting of the senate"[12] and it directs the governor to fill vacancies in all the elective constitutional offices of the executive department except that of lieutenant governor "and the appointee shall hold his office until his successor shall be elected and qualified." In addition, the Constitution specifically provides:

--That the state examiner "be appointed by the governor and confirmed by the senate" [Art. VII, Sec. 8];

--That the eight appointive members of the State Board of Education "be appointed by the governor, subject to the confirmation of the senate" [Art. XI, Sec. 11];

--That the members of the State Board of Equalization "be appointed by the governor, by and with the advice and consent of the senate;" not more than two of the members may be of the same political party and each is appointed to a six-year term and serves "until his successor shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy shall hold office for the unexpired term in which the vacancy occurs" [Art. XII, Sec. 15];

--And that the commissioners of agriculture and of labor and industry each "be appointed by the governor, subject to the confirmation of the senate" to a four-year term, serving "until his successor is appointed and qualified" [Art. XVIII, Sec. 1].

The Convention probably will want to consider whether the governor's power of appointment should be subject to confirmation by the senate. Those who favor the confirmation requirement consider it to be a healthy check on gubernatorial power. However, opponents of the requirement argue that the legislature has ample and more adequate power to check the governor through appropriations, legislation and such devices as the legislative audit. They argue that confirmation can encourage undesirable "politicking" by department heads and may be used by legislators to force their preferences on the governor. Moreover, they maintain that the necessity of submitting to senatorial examination may repel competent administrators and that, in any case, the governor will not appoint incompetent party "hacks" as his chief policy officers if he is to be held responsible for their administrative actions.

If the Convention determines that the requirement of senate confirmation should be retained, consideration might be given to providing that no one rejected by the senate for appointment to an office may be appointed to the office during the interim; such a provision would seem to be consistent with the intent of the confirmation requirement. On the other hand, the Convention also might want to provide that nominations not acted upon within a given period of time after receipt by the senate are automatically confirmed. Such a provision would preclude delaying tactics by the senate.

In addition to the confirmation requirement, the governor of Montana is restricted in his power to appoint by special constitutional and statutory requirements concerning age, residency, citizenship, geographical distribution, partisan representation, association membership, occupational experience and minimum educational level of nominees. It may be argued that such restrictions introduce extraneous considerations into the selection process and may prevent appointment of the person most ably suited for the position. However, requirements such as the latter two might be defended as assuring some degree of competence.

Removal Power

Although Article VII, Section 20 of Montana's Constitution authorizes the legislature to provide that the governor temporarily may suspend the state treasurer when the Board of Examiners determines such action to be necessary, the Constitution does not vest the general power of removal in the governor. Instead, Article V, Section 18 empowers the legislature to provide for removal:

> All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

The Montana Supreme Court has defined the governor's removal powers under the statutes enacted in pursuance of this constitutional provision. In State ex rel. Nagle v. Sullivan [98 Mont. 425, 40 P.2d 995 (1935)] the Court declared that in the absence of constitutional or statutory restraints, the power to appoint to office carries with it the power of removal; however, a provision for removal "for cause" requires notice to the officer of the charges made against him and an opportunity for him to appear in his own defense before removal may be effected.

The Convention probably will want to consider whether a new constitution should determine the extent of the governor's removal power. Among the numerous alternatives which are being utilized or have been proposed are the following:

--Authorization for governor to remove any officer he appoints;

--Provision that department heads serve at the pleasure of the governor, with the exception of specified state officials who are appointed for the term of the governor;

--Provision that single department heads serve at the pleasure of the governor, but that plural department heads be removable as provided by law;

--Requirement of senate confirmation of removal;

--Provision that a department head has the right to a public hearing if he feels he is being dismissed arbitrarily;[13]

--Requirement that dismissal be "for cause," and that the governor give notice to the officer of the charges against him and afford him an opportunity to be heard in his own defense.

These alternatives are not necessarily exclusive, but they vary widely in the extent to which the governor's power of removal is restricted. Each of the alternatives--except the first--limits the governor's removal power to some degree.

It is on the broad question of whether the governor's removal power should be subject to any limitations that controversy arises. Proponents of limiting the governor's removal power declare that unlimited power could result in arbitrary and capricious action on the part of the governor and that summary dismissal is unjust because it provides no opportunity for the dismissed appointee to be heard. Limiting the governor's removal power, they maintain, would supply a check against excessive concentration of power in the governor.

In contrast are the arguments of those who would remove limitations on the governor's power of removal and extend it to all officers in the executive department appointed by him. They contend that such extensive removal power is concomitant with centralization of state administration and of responsibility and accountability of the governor to the electorate. If the governor is to be held accountable for state administrative actions, they reason, he must be able, through the removal power, to exercise authority over the administrative personnel appointed by him. Thus, if the policies and conduct of an administrative subordinate of the governor are not in harmony with his administration as a whole, the governor should have authority to remove that subordinate. Furthermore, it is argued that it should not be necessary for the governor to establish cause in order to remove these administrative officers:

> Cause should not have to be established for the removal of key officers occupying positions vital to the success of the governor's administration. Those officials can affect significantly the smooth operations and the success of his administration without in any way committing an illegal act, or neglecting their administrative duties. Mere personality clashes between key administrative personnel may reach the point where replacement of one or both parties concerned may become necessary to restore harmony within the administration. In such a case, the governor must have authority to restore and maintain that harmony.[14]

GOVERNOR - LEGISLATIVE RELATIONS

In his relations with the legislature, the Montana governor is constitutionally empowered to "give to the legislative assembly information of the condition of the state, and . . . recommend such measures as he shall deem expedient" [Art. VII, Sec. 10]. In addition, the governor approves or disapproves of all measures passed by the legislature [Art. VII, Secs. 12 and 13; Art. V, Secs. 1 and 40], and is empowered to convene the legislature in special session and to determine the subject matter then to be considered [Art. VII, Sec. 11; Art. V, Sec. 6]. The final constitutionally defined relationship of the governor and the legislature is the requirement for senatorial approval of gubernatorial nominees [Art. VII, Sec. 7].

In some states, the governor has additional powers relating to the legislature. These powers include:

--The power to adjourn the legislature when the two houses cannot agree on adjournment. At present there is a constitutionally specified duration which the legislature cannot exceed; however, the Convention may authorize the legislature itself to fix the time of adjournment.[15]

--The power to fill legislative vacancies by gubernatorial appointment. Under statutory enactment [Revised Codes of Montana, 1947, Secs. 43-215 and 43-216], legislative vacancies in Montana presently are filled by the board(s) of county commissioners in the district from which the legislator was elected. Authorization for the governor to fill legislative vacancies would give the governor additional legislative influence, and some object that such appointment power violates the principle of separation of powers.

--The power to change the meeting place of the legislature in case of danger from disease or an enemy.

--The power to reapportion the legislature.[16]

As indicated, there is some overlap between the executive and legislative articles in defining the powers of the governor in relation to the legislature. Thus, while the governor's power to convene special sessions is established primarily in the executive article [Art. VII, Sec. 11], the legislative article also alludes to that power [Art. V, Sec. 6]; similarly, the governor's veto power is set forth in both the executive and legislative articles [Art. VII, Secs. 12 and 13; Art. V, Secs. 1 and 40]. The Convention may want to consolidate such sections and place treatment of the powers wholly within either the executive or the legislative article.

State of the State Address

Constitutional authority for the State of the State Address delivered by the governor at the beginning of each regular legislative session is found in his duty to inform the legislature of the condition of the state and to recommend measures he deems expedient. The governor also may deliver messages "from time to time" throughout the legislative session [Art. VII, Sec. 10]. The legislation suggested in the governor's messages usually reflects his major policies and programs; the governor's recommendations do not constitute formal introduction of any measures, but bills usually will be introduced on the subjects proposed. The message power of the governor has been characterized as his "affirmative" legislative role.[17]

> [T]he governor's direct involvement in the legislative process is desirable both because of his statewide constituency which affords him a perspective of the entire scope of the State's problems and because, as the State's chief executive, he has sources of information not readily available to the General Assembly which may make him aware of the need for revision of existing laws.[18]

The Executive Budget

Although Montana's Constitution does not specifically direct the governor to prepare the state budget, the present statutory responsibility of the governor to submit an executive budget to the legislature [Revised Codes of Montana, 1947, Sec. 79-1015] is supported by Article VII, Section 10 of the Constitution, which provides, in part:

> He shall also send to the legislative assembly a statement with vouchers of the expenditures of all moneys belonging to the state and paid out by him. He shall also at the beginning of each session present estimates of the amount of money required to be raised by taxation for all purposes of the states.

The proposal on how to allocate the revenue of the state through the executive budget is the single most important policy decision the governor makes. The executive budget is also a key tool of management which aids in centralizing administration of state government in the governor. The idea of executive budget preparation is widely accepted and, as noted above, Montana provides for an executive budget by statute. The Convention probably will consider whether it would be preferable to expressly authorize the executive budget in the constitution.[19]

One observer has noted that detailed provisions which go beyond mere constitutional authorization of the executive budget might be harmful:

> A few state constitutions spell out the budget procedures in some detail - Maryland and New York, for example. The effect of such provisions is to freeze current procedures into the constitution and foreclose experimentation. Budget procedures can be provided by statute and require no constitutional authorization, except possibly in the case of restrictions on the legislature's power to amend the budget bill or the governor's power to veto it.[20]

The Veto Power

Article VII, Section 12 of the Montana Constitution provides that every bill passed by the legislative assembly shall be presented to the governor before it becomes a law. If the governor signs the bill, it becomes law; "but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill." The affirmative vote of two-thirds of the members present in each house is necessary to override the governor's veto. While the legislature is in session, the governor has five days, not counting Sundays, to act on bills. If at the end of the five-day period a bill remains unsigned, it automatically becomes law. After adjournment, however, the governor must approve a bill within fifteen days of the time it was presented to him or it does not become law; this is, in effect, the "pocket veto." Under the provisions of Article VII, Section 12, after adjournment the governor is required to file unsigned or vetoed bills "with his objections, in the office of the secretary of state."

While Article VII, Section 12 of the Constitution is concerned with bills passed by the legislature, Article V, Section 40 requires presentation to the governor, and authorizes his veto, of:

> Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses. . . .

The Supreme Court, in State ex rel. Livingstone v. Murray [137 Mont. 557, 354 P.2d 552 (1960)], held that this section requires submission to the governor of proposed constitutional amendments.

Article V, Section 1 circumscribes somewhat the governor's veto power:

> The veto power of the governor shall not extend to measures referred to the people by the legislative assembly or by initiative or referendum petitions . . . .

Finally, Article VII, Section 13 authorizes the veto of distinct items in appropriation bills. In Mills v. Porter [69 Mont. 325, 222 P.2d 428 (1924)], the Supreme Court held that this section does not permit the governor to reduce items in appropriation bills.

Gubernatorial Veto of Constitutional Amendments

The Convention will probably want to consider whether the governor should be removed from the process of amending the state and federal constitutions. Constitutional amendments initially must be approved by a two-thirds vote in each house--the same majority required to override a gubernatorial veto. Therefore, there seems to be little if any reason to involve the governor in the process. Furthermore, it can be argued that the process of constitutional amendment is a distinctive "constituent" function shared by the legislature and the voters, and that the executive has no proper role with respect to it. Joint resolutions ratifying proposed amendments to the United States Constitution are also submitted to the governor for his signature. In Hollingworth v. Virginia [3 Dall. 378 (1798)], there is clear precedent against the authority of a governor to veto ratification of amendments to the United States Constitution. The Legislative Council in 1968 recommended that the governor be specifically removed from the amendment process for both the state and federal constitutions.[21]

Alteration of the Veto Power

Numerous alternatives have been proposed to alter the governor's veto power. The central issue in these proposals is whether they will establish or maintain the proper balance between the executive and legislative branches of government. Although the executive veto has been characterized as an essentially negative device, the threat of veto can be positively utilized by the governor in formulation of public policy.[22]

Opponents of broadening the governor's veto power declare that the balance of influence already operates in favor of the governor in his power to determine what legislation will become law, and that the strong veto weakens the legislature by allowing it to defer to the governor on weighty questions.[23]

On the other hand, advocates of extension of the gubernatorial veto power argue that the governor is the only one in the legislative process who represents all the people of the state and therefore occupies the best position to weigh the total impact on the public interest of each bill.[24]

Section Veto. One proposal for broadening the governor's power in the legislative process is the section veto. This power would allow the governor to veto individual sections of substantive nonfiscal bills. Such a veto might facilitate passage of legislation generally favored by the governor; it clearly would increase the alternatives available to the governor in acting upon legislation he favors only partially. It would be particularly useful if, as in Congress, the legislature could attach non-germane riders to necessary legislation; however, Montana's

Constitution prohibits a bill from embracing more than one subject [Art. V, Sec. 23]. The section veto, moreover, is subject to criticism that it might diffuse responsibility between the governor and the legislature, thus encouraging "buck-passing."

Amendatory Veto. Perhaps a better alternative than the section veto is the amendatory veto which permits the governor to return a bill to the legislature with recommendations for changes that would make the bill acceptable to him. The legislature then has only the options of amending the bill in the manner suggested by the governor or of attempting to force the original bill into law.

Proponents of the amendatory veto cite its utility in instances when the governor objects to only parts of a bill but recognizes the general merit of it. Moreover, because the final bill is either mutually acceptable to the governor and the legislature or a clear legislative responsibility through overriding a veto, the amendatory veto is not subject to the charge of "buck-passing." In states which provide for the amendatory veto, governors tend to use it more than the regular veto; evidence indicates it has worked well. However, it should be noted that the amendatory veto is most useful when the legislature does not engage in deferring action on most of its bills until the closing days of the session.[25]

Reduction Veto. A proposed extension of the governor's power to veto items in appropriation bills is the reduction veto--the power to reduce items in appropriation bills. Proponents of the reduction veto declare that it would revitalize the intent of the item veto. Because line item detailing has largely been replaced by lump sum appropriations for expenditure categories, selective item vetoes have been rendered virtually obsolete; under the present system of appropriations, the veto of an item in an appropriation bill might destroy an entire program within an agency. Armed with the reduction veto, however, and

> [g]iven an appropriation the Governor deems excessive, he will once more be able to effect a reduction rather than being confronted with the necessity of either vetoing a substantial and justifiable aggregate because of the unacceptability to him of some sub-item, or allowing an objectionable expenditure because to preclude it would work harm on the larger item of which it is a part.[26]

Opponents of the reduction veto declare that it might result in irresponsibility and "buck-passing" because it encourages the legislature to appropriate large sums of money to popular causes, shifting the onus of reducing the appropriations to the governor, while it also enables the governor to thwart an activity or program without the stigma of killing it. The amendatory veto discussed above meets and satisfies these objections.

Requirement for Overriding Veto. The effect of the veto in Montana cannot be determined because there are no readily available statistics relating to the number of vetoes made and, more importantly, overridden. A study made of all states for 1947 might be indicative, however:[27]

Bills passed in both houses	24,928
Bills vetoed and pocket vetoed	1,253
Vetoes overridden	22

Montana's Constitution currently requires the affirmative vote of two-thirds of the legislators present in each house to override a gubernatorial veto. This requirement is less stringent than that of numerous states in which the requirement is two-thirds of the elected membership; it is more stringent than the requirements of those states which provide for a majority or three-fifths vote of those present. Other requirements are: a majority of elected members; three-fifths of those elected, and three-fourths of elected members in joint session. Where the requirement is approximately a simple majority, the governor's veto would not seem to constitute a substantial check on legislative discretion; rather, it would seem to take on the nature of an advisory opinion.

Time Period for Gubernatorial Consideration of Bills. Presently, the governor has five days (Sundays excepted) to consider bills presented to him five or more days before the legislature adjourns. He has fifteen days to consider bills presented to him less than five days before or upon adjournment of the legislature. Most observers suggest that such time limits are unrealistic and should be increased so that the governor might have more time to consult with his administrative departments and to seek legal research and advice.

> Those who would increase the period for gubernatorial consideration often suggest 15 days for in-session bills and 45 days after adjournment. Some would also set up the first 15 days of the post-adjournment period as a time when no bills would either be signed or vetoed. Extended periods, it is contended, would permit more time for research by the Governor's staff as well as an additional opportunity for interested parties to express their opinions. Those who would extend the review periods argue that the present periods do not provide enough time for bills to receive sufficient study, public criticism is not heard and undesirable propositions are sometimes approved.[28]

It is interesting that the 1884 Montana Constitutional Convention had authorized ten days for gubernatorial consideration of bills during the legislative session; the change to five days was one of the few alterations of the executive article during the 1889 Convention.

Pocket Veto. If the governor neither signs nor vetoes a bill within the specified fifteen-day time period after the legislature adjourns, the bill dies; this is the pocket veto. It would seem that the principal objection to the pocket veto--that it does not require the governor to state his objections and therefore obscures gubernatorial responsibility for killing legislation[29]--is avoided by the constitutional requirement that the governor file bills he fails to approve "with his objections" in the secretary of state's office after adjournment of the legislature [Art. VII, Sec. 12].

The pocket veto could be effectively eliminated by providing that bills unsigned within a designated period after adjournment of the legislature become law just as they do when the legislature is in session.

Post-Adjournment Veto Sessions. The primary objection to the post-adjournment veto is that it provides no opportunity for the legislature to override the veto and thus gives the governor unfair advantage. This objection is quite significant, for the the bulk of legislation usually is passed in the final days of the session and comes to the governor for review after adjournment.

The legislature could be provided an opportunity, or could be required, to consider all gubernatorial vetoes by such alternative devices as the continuous session,[30] authorization for the legislature to call itself into special session or a post-adjournment veto session. Advocates of the status quo, however, say the present system provides deadlines for legislative work and permits inter-session periods during which the governor and his staff can concentrate on administrative matters.[31]

If the Convention decides the legislature should have an opportunity to consider post-adjournment vetoes, the question then becomes whether such a veto session should be mandatory or optional. Proponents of a mandatory veto session argue that such a requirement would force the legislature either to defend its original support of a bill by overriding the governor's veto or to concur in the governor's veto; they contend that objectionable bills are sometimes passed with the expectation that they will be vetoed, and that a mandatory veto session might encourage more careful initial consideration of bills by the legislature.

Opponents of the mandatory veto session maintain that the benefits gained would not justify the additional costs. Instead, some suggest that upon filing of all post-adjournment vetoes, the secretary of state be required to mail ballots to the members of the house of origin who would vote before a notary public. If the house of origin overrides the governor's veto, the members of the second house likewise would vote on the question.

Another approach to the post-adjournment veto is to require that vetoed bills be returned to the legislature for reconsideration at the opening of its next session. However, such a provision might involve a new governor as well as a different legislature.[32]

Special Legislative Sessions

Under Article VII, Section 11 of the Constitution, the governor is authorized to convene the legislature in special session and to determine the special session agenda; thus, the governor's influence on legislation is strengthened during special sessions. The Convention probably will consider sharing these gubernatorial powers with the legislature. The Legislative Council in 1968 concluded that Article VII, Section 11 should be redrafted to allow the legislature to call itself into session.[33]

There are two methods currently used by which the legislature shares the power to convene special sessions. Under one method, the governor is required to call a special session on petition of an extraordinary majority of the members of the legislature; under the other method, the legislature may convene in special session under its own authority.

Presently, the governor is required by the Constitution to designate the subject matter to be considered in special session. The Supreme Court, in Pierson v. Hendricksen [98 Mont. 244, 38 P.2d 991 (1934)], has interpreted this section to allow the governor to designate additional subjects after the initial call of the special session. Thus, Montana's Constitution presently limits consideration of subject matter during special sessions to subjects specified by the governor. In some states, however, the legislature may initiate and consider additional business.

Proponents of sharing with the legislature the power to call special sessions and to determine the subject matter to be considered argue that the independence of the legislature and its designation as the policy-making branch require that it be empowered to convene itself without dependence on the governor, or even against his wishes, and to determine the agenda. Opponents argue that the governor, as a full-time executive, is in the best position to determine the need for a special session; furthermore, opponents fear that sharing the powers with the legislature might make it more likely that the legislature would not complete its work in regular session.

GOVERNOR - JUDICIAL RELATIONS

Article VII, Section 34 of the Montana Constitution directs the governor to fill vacancies on the Supreme Court and the district courts and in the office of clerk of the Supreme Court. Senate confirmation is not required for such interim appointments; the gubernatorial appointee serves "until the next general election and until his successor is elected and qualified."

The governor also is statutorily authorized under certain circumstances to require a district judge to hold court in another county:

> If for any cause a district court is not or cannot be held in any county by the judge or judges thereof, or by a district judge requested by such judge or judges to hold such court, or if the business of the court in any county is not or cannot be dispatched with reasonable promptness, the governor may, upon application of any interested person, by an order in writing, require some district judge to hold court in said county for such time as may be specified in the order. [Revised Codes of Montana, 1947, Sec. 93-312]

However, this statutory provision does not vest extensive power in the governor, for the Montana Supreme Court has held that although the section is constitutional, it should not be resorted to until other statutory remedies for securing a judge to act where the resident judge(s) are disqualified have been exhausted.[34] In State ex rel. Bennett v. Bonner [123 Mont. 414, 214 P.2d 747 (1950)], the Court has further cautioned that this statute does not empower the governor to in effect remove from office a duly elected, qualified and acting district judge and order another district judge to assume judicial powers in the district.

> Such powers would place the business of the courts at the mercy of the chief executive . . . . it is from the supreme court of this state rather than from the supreme executive power of the state that relief is to be had when a district court or a district judge is in error or in need of superintending guidance or correction.[35]

Probably the most important issue regarding governor-judicial relations is whether the method of selection of judges should be changed from the elective system to one of initial appointment by the governor. Two alternatives are available to achieve an appointive system: (1) appointment power vested in the governor alone, probably with a requirement for senate confirmation (executive appointment); and (2) appointment power vested in the governor, but with the requirements that the appointee come from a slate of candidates submitted by a nominating commission and that after an initial term of service he must submit to a retention election to remain in office (merit selection). A full discussion of the alternatives is contained in the study on the judiciary in this series of reports for the Constitutional Convention. The Montana governor presently has quite extensive de facto powers of judicial appointment because vacancies often occur in judicial offices and, under Article VIII, Section 34, are filled by gubernatorial appointment. Thus, four of five current Supreme Court justices and at least three-fourths of the twenty-eight district judges were initially appointed to office by the governor.[36]

Another question the Convention might consider is whether the governor should be empowered to require advisory opinions from the State Supreme Court. Although a few states presently permit such advisory opinions, arguments have been advanced against the provision:

> First, if judges may give advisory opinions, they will often be called upon to act before an actual controversy arises. It is submitted that the judicial process is better suited to resolve disputes based on concrete facts. Second, often no real adversary proceeding will be joined with all of the concomitant pro-and-con advantages such a proceeding affords.[37]

MISCELLANEOUS POWERS

Executive Clemency

The power of executive clemency is vested in the governor in Article VII, Section 9 of the Constitution. In that section, the governor is authorized to grant absolute or conditional pardons, commutations of punishments and respites and to remit fines and forfeitures. These powers may be utilized only after conviction and only in criminal cases. An additional restriction, imposed by the policy of the Board of Pardons, is that a petitioner must have completed his sentence before applying for pardon.[38]

A proviso in the Constitution seems to impose a further limitation on the governor's power:

> Provided, however, That before granting pardons, remitting fines and forfeitures, or commuting punishments, the governor shall be advised concerning the same and that such action has been approved by a board, or a majority thereof, who shall be known as the board of pardons. [Montana Const. Art. VII, Sec. 9]

Thus, it would appear that the governor's exercise of executive clemency must have, at a minimum, the approval of a majority of the Board of Pardons. It would seem that the governor is not constitutionally required to concur in a recommendation of clemency from the Board, but that he must have the Board's approval before he can exercise his clemency powers.

A provision in Article IX, Section 2 also relates to executive clemency. It withholds from every convicted felon the right to vote "unless he has been pardoned or restored to citizenship by the governor." Such language suggests that there is a difference between being pardoned and being restored to citizenship. Thus, under Montana's Constitution, gubernatorial pardon includes restoration of the right to vote and, contingently, the right to hold public office [Art. IX, Sec. 11]; in addition, a felon may be restored to citizenship by the governor without being pardoned. Other than the right of suffrage, the Constitution does not resolve what rights--civil and political--are restored by a pardon; nor does the Constitution determine what is involved in restoration to citizenship. Under present law [Revised Codes of Montana, 1947, Sec. 94-4720], it is apparently necessary for a person who has been pardoned by the governor to make separate application for restoration to citizenship. The

Convention might want to define the rights to be included in a pardon; similarly, the constitutional language might specify the rights included when a felon is restored to citizenship. In the alternative, a new constitution might direct the legislature to provide such definitions.

Finally, the Convention might want to consider eliminating the constitutional status of the Board of Pardons and authorizing the governor to delegate his clemency powers subject to such procedures as may be prescribed by law. The Model State Constitution authorizes such delegation of clemency powers, arguing that:

> It is the view of responsible legal and penological authorities that, in addition to legal and political considerations, the granting of pardons involves complex judgments of a correctional and behavioral nature and that chief executives are neither trained to exercise such judgments nor can they be expected to have any special interest in doing so. Hence, the Model expresses the view that a state constitution should leave the matter to legislative development. While recognizing clemency powers to be executive in nature, the section permits the governor to delegate them "subject to such procedures as may be prescribed by law." This will leave room for the creation of such expert or professional boards or agencies to deal with matters of clemency as may be appropriate.[39]

Military Powers

Article VII, Section 6 is the source of the military powers of the governor. That section declares the governor to be "commander-in-chief of the militia forces of the state, except when these forces are in the actual service of the United States" and empowers him "to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion." The governor alone has authority to determine the necessity of military intervention, and neither the courts nor local authorities may interfere with his determination.[40]

The Supreme Court in 1914 limited the scope of the governor's power under this section. In In Re McDonald [49 Mont. 454, 143 P. 947 (1914)], it declared that although the state militia might arrest and detain insurrectionists until they could be safely delivered to civil authorities for trial, the governor had no power to suspend the writ of habeas corpus and no constitutional authority to establish a form of martial law which would authorize the conviction of a citizen without trial by jury:

> [H]e has no power to proclaim absolute martial law, which means the supremacy of the will of the military commander, the abrogation of all constitutional guaranties and state laws, and the conviction of civilians for crime by military commissions, without trial by jury. [finding no. 6]

Three sections in Article III, the Declaration of Rights, also relate to the governor's military powers:

> Article III, Section 21. The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety require it.
>
> Article III, Section 22. The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.
>
> Article III, Section 31. No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislative assembly, or of the governor when the legislative assembly cannot be convened.

The designation of the governor as commander-in-chief in Article VII, Section 6 insures effectuation of the provision in Article III, Section 22 that the military be subordinated to the civil power.

The militia of the state is provided for in a separate constitutional article--Article XIV, Military Affairs. The militia is divided into an active or organized body and a reserve or unorganized body, the latter composed of all persons liable to military duty not enlisted in the active or organized body. The organized portion of the state militia is the Montana National Guard, which is subject to detailed federal legislation and regulations. Federal legislation is controlling over the constitutional provisions of Article XIV. For example, although Section

1 of Article XIV provides that the militia "shall consist of all able-bodied male citizens of the state between the ages of eighteen (18) and forty-five (45) years inclusive," federal law sets the militia's age limits at 17 and 45 [10 United States Code 311a]. Because of the pre-eminence of the federal government in military affairs in the modern era, the Convention may wish to eliminate Article XIV in its entirety. Such elimination would not cause any significant change in the status and operation of the militia; retention of provisions similar to those in Article VII, Section 6 would be adequate constitutional authority for a state militia. If it seems desirable, the section might specifically provide that there shall be a state militia. In 1968, the Montana Legislative Council determined that although provision for a state militia is desirable, an entire constitutional article should not be devoted to military affairs.[41]

An item which the Convention might consider is the governor's power to declare a state of emergency in time of natural disaster. Although the National Guard has been called into service on several such occasions, the governor is neither constitutionally nor statutorily directly empowered to call up the militia in such circumstances. Though it is doubtful that this power ever would be challenged, it might be advisable to specifically authorize the declaration of a state of emergency during natural disaster.

Issuance of Commissions

Article VII, Section 18 of the Montana Constitution provides:

> All grants and commissions shall be in the name and by the authority of the state of Montana, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

Although the National Municipal League maintains that the governor's power to commission all officers of the state is a "usual and necessary [provision] to implement the governor's executive powers,"[42] the Montana Legislative Council in 1968 declared that Article VII, Section 18 may be unnecessary and concluded that, at the least, reference to the great seal should be deleted.[43] The language of this section is basically statutory in nature. However, if the Convention determines that the governor should have constitutional power to commission state officers, it would be unnecessary to devote an entire section to this power; rather, it might be incorporated in a general provision outlining the administrative powers of the governor.

CHAPTER III

NOTES

1. "The governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information in writing, at any time, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution . . . ." [Montana Const. Art. VII, Sec. 10]

   "An account shall be kept by the officers of the executive department, and of all public institutions of the state of all moneys received by them, severally from all sources, and for every service performed, and of all moneys disbursed by them severally, and a semi-annual report thereof shall be made to the governor, under oath; they shall also, at least twenty days preceding each regular session of the legislative assembly, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislative assembly." [Montana Const. Art. VII, Sec. 19]

   "The state treasurer shall keep a separate account of each fund in his hands, and shall at the end of each quarter of the fiscal year report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place or places where the same is kept or deposited, and the number and amount of every warrant paid or redeemed by him during the quarter . . . ." [Montana Const. Art. XII, Sec. 13]

2. National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York, 1963, 1968), Sec. 5.04. Cited hereafter as National Municipal League, Model Constitution, 6th ed.

3. John Welling Smurr, "A Critical Study of the Montana Constitutional Convention of 1889," unpublished Master's thesis (University of Montana, 1951), pp. 118-119.

4. Albert L. Sturm and Fred S. Steingold, The Executive and Civil Service in the Michigan Constitution (Lansing: Constitutional Convention Preparatory Commission, 1961), p. 12.

5. Joseph M. Dixon, *Message to the Seventeenth Legislative Assembly* (Helena: State Publishing Co., 1921), p. 20.

6. Montana, Legislature, "Report of Joint Committee on State Governmental Organization," *House Journal of the Twenty-Seventh Legislative Assembly of the State of Montana* (Helena, 1941), p. 400.

7. Montana, Legislative Council, *Executive Reorganization*, Report No. 7 (Helena, 1962), p. 9.

8. Dawn Clark Netsch, "The Executive," *Con-Con: Issues for the Illinois Constitutional Convention* (Urbana: University of Illinois Press, 1970), p. 160. Cited hereafter as Netsch, "The Executive."

9. Hawaii, Legislative Reference Bureau, *Article IV: The Executive*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 22. Cited hereafter as Hawaii Reference Bureau, *Article IV: The Executive*.

10. Public Administration Service, "The Executive Department," *Constitutional Studies*, Reports prepared for Alaska Constitutional Convention, 3 vols. (Chicago, 1955), 2: 11, 12.

11. Michigan, Joint Legislative Committee on Reorganization of State Government, *General Management of Michigan State Government*, Staff Report No. 30 (Lansing, 1951), Part III, Appendix XI, pp. 44-49, cited in Coleman B. Ransone, Jr., *The Office of Governor in the United States* (University: University of Alabama Press, 1956), pp. 374-377.

12. In *State ex rel. Nagle v. Stafford* [97 Mont. 275, 34 P.2d 372 (1934)], the Supreme Court held that appointments requiring senate confirmation are ineffective until so confirmed and that the incumbent officeholder could remain in office and perform the duties of the office even though his term of office had expired during a recess of the senate. The effect of the decision is to prevent the governor from making an interim appointment when the incumbent officeholder refuses to leave the office because, according to the Court, no vacancy exists in the office when the incumbent is holding over and performing the duties of the office. That decision was affirmed in *State ex rel. Olsen v. Swanberg* [130 Mont. 202, 299 P.2d 466 (1956)], in which the Court noted that under Article VII, Section 11 of the Montana Constitution the governor could call the senate into special session to submit, during the interim, appointments which required senate confirmation.

13. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, *Bill of Rights*, Montana Constitutional Convention Study No. 10 (Helena, 1971).

14. Byron R. Abernathy, Some Persisting Questions Concerning the Constitutional State Executive, Governmental Research Series No. 23 (Lawrence: The University of Kansas Governmental Research Center, 1960), p. 18.

15. See discussion of unlimited sessions in Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, The Legislature, Montana Constitutional Convention Study No. 12 (Helena, 1971). Cited hereafter as Montana Constitutional Convention Commission, The Legislature.

16. See discussion of reapportionment in Montana Constitutional Convention Commission, The Legislature.

17. Netsch, "The Executive," p. 176.

18. Maryland, Constitutional Convention Commission, Report of the Constitutional Convention Commission (Annapolis: Office of the Secretary of State, 1967), p. 163.

19. See Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Taxation and Finance, Montana Constitutional Convention Study No. 15 (Helena, 1971).

20. Netsch, "The Executive," p. 170.

21. Montana, Legislative Council, The Montana Constitution, Report No. 25 (Helena, 1968). Cited hereafter as Montana Legislative Council, Montana Constitution.

22. Netsch, "The Executive," p. 177.

23. Ibid., p. 178.

24. New York, Temporary State Commission on the Constitutional Convention, State Government, Report No. 14 (New York, 1967), p. 47. Cited hereafter as New York Temporary Commission, State Government.

25. Netsch, "The Executive," p. 180.

26. Illinois, Constitutional Convention 1970, Committee on the Executive, Synopsis: Proposed Executive Article (Springfield, 1970), p. 65. The Committee recommended that only a majority vote be required to override the reduction veto "because in invoking the new power the Governor will, in effect, be dividing into two items what the General Assembly has considered a single item." [p. 66]

27. "The Executive Veto in American States," The Western Political Quarterly 3 (1950): 103.

28. New York Temporary Commission, State Government, pp. 110, 111.

29. Hawaii Reference Bureau, Article IV: The Executive, p. 62.

30. See discussion of continuous sessions in Montana Constitutional Convention Commission, The Legislature.

31. New York Temporary Commission, State Government, p. 112.

32. Illinois, Legislative Council, Executive Vetoes After Adjournment of the Legislature, Bulletin 5-034 (Springfield, 1964), pp. i, ii.

33. Montana Legislative Council, Montana Constitution, p. 36.

34. State ex rel. Smith, 116 Mont. 251, 151 P.2d 500 (1944).

35. State ex rel. Bennett v. Bonner, 123 Mont. 414, 431, 434, 214 P.2d 747 (1950).

36. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, The Judiciary, Montana Constitutional Convention Study No. 14 (Helena, 1971).

37. Maryland, Constitutional Convention Commission, Constitutional Revision Study Documents (Annapolis: Office of the Secretary of State, 1968), p. 154.

38. Letter from Bobby C. Miles, Director, Montana State Board of Pardons, Deer Lodge, Montana, November 4, 1971.

39. National Municipal League, Model Constitution, 6th ed., pp. 69, 70.

40. In Re McDonald, 49 Mont. 454, 143 P. 947 (1914).

41. Montana Legislative Council, Montana Constitution, p. 65.

42. National Municipal League, Model Constitution, 6th ed., p. 69.

43. Montana Legislative Council, Montana Constitution, p. 38.

CHAPTER IV

THE EXECUTIVE BRANCH: ORGANIZATION AND STRUCTURE

EXECUTIVE REORGANIZATION[1]

Organization of the executive department has been an issue in state government for years. Bennett M. Rich, professor of government and former director of the bureau of government research at Rutgers University, has said "the constitution is no place to define the administrative structure by which the state will carry on its business."[2] The constitutions of all states, however, directly guide the structure of the executive department, either through what they provide or by what they fail to provide.

As early as 1918, moves toward executive reorganization through constitutional change were being made, with Massachusetts adopting an amendment organizing all executive and administrative work into not more than twenty departments. Twenty also is the prescribed maximum in Colorado (by 1966 amendment), Hawaii (in its 1968 Constitution) and in the proposed constitutions defeated in Arkansas, Maryland and New Mexico. Twenty-five is the maximum number allowed in North Carolina (1970 amendment) and in the new Florida Constitution. Other constitutional changes have modified organization, procedures and powers of administrative agencies in at least seven states.[3]

The problem of executive organization was noted in 1960 by the Montana Legislative Council:

> Regardless of constitutional language vesting the supreme executive power in the governor, the executive authority in Montana actually has been dispersed among more than 100 state agencies.
>
> Of the hundred odd agencies in the executive branch of government only three operating agencies are effectively responsible to the governor. Depending on the personal or political relationship between department heads or governing boards and commissions and the governor, and on the strength of the governor's personality, he may exert personal or political influence over these departments. However, the legal and constitutional framework of Montana's government does not force the governor to play an active and interested role in the administration of state government. The result is a kind of "government by option" insofar as the chief executive is concerned. Furthermore, when department heads or board members are appointed for fixed terms and cannot be removed except for cause, a governor is not naturally encouraged to participate in, or "interfere" with the activities of

> the agency. There have been rebellions of commissions in this state as a result of attempts by the governor to dictate policy to an agency governed by a board appointed wholly by him. One such incident could be enough to deter a governor from attempting to exercise leadership over other departments in the executive branch.
>
> While members of the Legislative Assembly have recognized that our state government is largely comprised of semi-autonomous and often irresponsive agencies, they often attribute the lack of legislative control over these departments to excessive powers of the executive branch. The powers exercised by the executive branch of Montana's state government are not excessive but they are often irresponsive and uncontrolled. There are no well-defined lines of responsibility within the executive branch itself and there is no balance of control exercised by the legislative branch.
>
> A responsible executive branch, properly headed by a governor vested with adequate authority, balanced by a system of independent controls such as the legislative post-audit, would increase the effectiveness of the legislature. A strengthening of the office of governor would not only strengthen the legislative branch by providing some insurance that its policies would be carried out, but would free it from the necessity of concerning itself with details that should be left to administrators.[4]

Although the issue of executive reorganization received a good deal of attention in Montana for several years, the 1969 Legislature was the real initiator of definite action. In that year, the Montana Commission on Executive Reorganization was created. The Commission was composed of nine members: the governor, who was chairman; four members of the house appointed by the speaker, two from each political party; and four members of the senate appointed by the committee on committees, two from each political party. The Commission was to "make a detailed and thorough study of the executive branch of state government and of the possible reorganization thereof."[5]

The 1969 Legislature also proposed two constitutional amendments dealing with executive reorganization, both of which passed at the 1970 general election and are now effective. One amendment added Section 21 to Article VII, the executive department article. The amendment provides:

> All executive and administrative offices, boards, bureaus, commissions, agencies and instrumentalities of the

> executive department of state government and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of the state, attorney general, state treasurer, state auditor, and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than July 1, 1973. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections, or units in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department.

The other amendment, called the "amendment" amendment, changed Article XIX, Section 9 to read:

> Not more than three amendments to this constitution shall be submitted at the same election, except that there may be submitted at each of the general elections held in the years 1972, 1974 and 1976, in addition to the three amendments otherwise authorized by this section, an amendment or amendments providing for the reorganization of the executive department of government which may include the revision or repeal of sections of this constitution relating to any boards, offices, and departments other than legislative and judicial offices. The reorganization of the executive department is a single subject, and an additional amendment relating to that subject authorized by this section may be submitted to the qualified electors of the state in the form of a title clearly expressing its subject.

Previously, this section had ended with the phrase "Not more than three amendments to this constitution shall be submitted at the same election."

The amendments provided two bases for executive reorganization. The twenty department amendment provides the actual framework for statutory reorganization and the "amendment" amendment provides a means for effecting further change in executive offices, boards, commissions and agencies created in the Constitution, through comprehensive amendments initiated by the legislature.

Most modern constitutional scholars and state government efficiency experts regard extensive executive departmentalization--especially when constitutional in nature--as a governmental malady and prescribe constitutional and statutory reorganization as a remedy. What, then, prompted the original framers of constitutions to include extensive provisions for executive departmentalization and not to include some system for limiting what the Legislative Council in 1960 called "topsy-like" growth of government?

John D. Hicks, in his study The Constitutions of the Northwest States,[6] says these conditions are a result of two apparently contradictory tendencies. On the one hand, constitutional framers beginning in about 1840 tended to constitutionally assign or attempt to provide for all functions they thought the state should provide its citizens. These functions reflect the problems and issues of the day, some of which have since decreased in importance. On the other hand, framers also distrusted government in general, and hoped the enumeration and detailed constitutional structuring of functions would effectively check government, particularly the strong executive. The contradiction arises when one considers the prodigious assignment and structuring of powers versus the desire for a strict limitation of powers.

Framers of the Montana Constitution hoped to provide for the functions they saw necessary by constitutional means. This attempt operated on several assumptions, one of which probably was that the functions the state should provide were relatively static in nature. However, Montana has not remained static since 1889, as legislatures in subsequent years were to discover. The framers provided constitutionally for a State Depository Board and a Board of State Prison Commissioners to perform functions deemed necessary in 1889. By 1971, the functions these boards were created to perform either have been transferred to other branches of government or eliminated, leaving both boards as existing but operationally defunct agencies. On the other hand, in 1889 the framers saw no need for the functions performed in 1971 by the highway department and the Department of Health and Environmental Sciences, so they made no constitutional provision for them.

The changing role and functions resulted in many problems for the administration of state government. In order to provide for new functions, the Joint Select Committee on State Governmental Organization of the 1941 Legislature found:

> The state legislative assembly has created many of our state bureaus and offices in response to persistent popular demands. The state is frequently required to enter into a new activity on account of growing population and development of resources. Additional

> supervision, or regulation by state authority is demanded to furnish more adequate protection to the people.
>
> But, the Legislative Assembly is very often betrayed into an illogical position. A new office, or bureau, is frequently created to perform a function closely related to the work already being done by an existing office or bureau, when instead of creating a new office or bureau, the Legislature should have provided for the necessary extension of power of an existing office.
>
> Constitutional limitations make any immediate or complete reorganization impossible. Constructive progress, however, demands the formation and acceptance of a more efficient organization plan which may be followed in a long-time program. Necessary constitutional amendments will have to be submitted later and legislative changes should conform to the accepted plan for reorganization.[7]

The Montana framers also had hoped to provide for a strong system of checks and balances to hinder the growth of a strong government (especially a strong governor) that would be unresponsive to popular control. They tried to create a state government in which responsibility could readily be established by the people.

But the growth of legislatively and administratively created agencies, coupled with the constitutional provisions already in existence, undercut that intent. The Commission on Executive Reorganization found that during the 1960s the legislature increasingly found it no longer could intelligently exercise its responsibilities with respect to the executive branch. Fragmentation of responsibilities within the executive branch decreased the legislature's ability to make broad and comprehensive policy directives, restricted its ability to determine precisely whether its policies were being carried out by the executive branch, hampered prudent financing of government, increased the retinue of competing demands from the government to the legislature and increased to "unmanageable dimensions" the amount of trivia with which legislators had to concern themselves.[8] The Commission concluded:

> Change is imperative when the sheer bulk of the executive branch is such a threat to the legislative branch's effective and responsible exercise of control over the executive branch.[9]

Executive branch organization thwarted the governor as well as the legislature, the Commission found. Because of the autonomous and independent nature of most state agencies, the governor simply was not allowed or required to act as the overall administrator. If this prevented the governor from building a strong power base antithetical to and unchecked by the electorate, it also prevented him from assuming real authority over the administration of government. As the Commission noted, "The Governor, then, does not hold executive authority commensurate with the burden of responsibility he is required to bear."[10]

As for the electorate whom the framers designed the Constitution to serve, the Commission found:

> The lack of central and direct authority in executive state government does not, as it was intended to do, serve to protect the interests of the people; in fact, the people are "shortchanged" because the scattering and disbursing of executive authority that is the present policy in the organization of Montana's executive branch does not promote democratic government simply because it is impossible for the electorate to meaningfully fix definitive and true responsibility anywhere for the administration of governmental affairs.[11]

In determining its overall reorganization plan, the Commission on Executive Reorganization stated the following general objectives:

1. Make state government more responsive and responsible to the people whom it serves.
2. Provide a system of central direction and control whereby the policies of the Governor and the Legislature may be executed more directly and expeditiously.
3. Organize and group duties on a currently functional basis--thereby improving services, planning, and providing economy to the taxpayers.
4. Clarify channels of authority and responsibility.
5. Provide the Governor and department heads with flexibility in departmental organization and reorganization.
6. Standardize nomenclature and terminology where appropriate.[12]

In making its recommendations for executive reorganization, the Commission stated it had been guided by the following principles:

1. The plan for the overall reorganization of the executive branch of state government should be as simple as possible, and the number of separate autonomous organizational units should be held to a minimum. In this regard, the Commission has formulated the overall plan on the basis of the constitutional amendment which requires that the executive branch be composed of not more than 20 executive agencies, exclusive of the seven constitutionally elected state officials.

2. The organizational structure of the executive branch should be integrated and unified by means of a central executive authority (the Governor) and lines of authority should be clearly defined and the channels of communication opened from top to bottom of the organization.

3. Functions and responsibilities should be allocated to the various organizational units on the basis of similarity of character, and subject matter, and in the types of operating staff required.

4. There must be a continuity of substantive operating policy within the several departments of the organization. The Commission does not believe that the addition, deletion, or alteration of the current functions of executive state government is within the scope of its activities. Under the proposed plan of organization the functions of executive state government will continue to be performed as at present. Only the lines of authority and responsibility will be affected if the recommendations of the Commission are adopted.

5. Where possible, departments should be headed by single administrators appointed by the Governor and responsible to him.

6. Plural bodies with administrative functions should be abolished, where possible. Plural bodies should be limited to advisory, quasi-judicial, and quasi-legislative functions, where possible.

7. Participation of citizens in government should be encouraged through the use of advisory committees appointed for specified terms and specified purposes.[13]

The last two legislative sessions have agreed with the Commission on Executive Reorganization that the "fact that state government is unmanageable and uneconomic may be attributed in large measure to the present situation of 188 agencies."[14] It was this conclusion that prompted the passage of the Executive Reorganization Act of 1971 [Title 82A, Revised Codes of Montana, 1947].

Title 82A was enacted by the 1971 Legislature. Some sections of the act went into effect immediately upon passage and approval; others, including the specific chapters creating departments, were left to executive implementation until December 31, 1972, by which time all provisions must be in effect.

The act divided the executive branch into nineteen major departments and the seven constitutionally elected offices. It limited the number of executive departments to twenty and provided controlling guidelines for administratively created agencies. The act was designed to

> create a structure of the executive department of state government which is responsive to the needs of the people of this state and sufficiently flexible to meet changing conditions; to strengthen the executive capacity to administer effectively and efficiently at all levels; to encourage greater public participation in state government; to effect the grouping of state agencies into a reasonable number of departments primarily according to function; to provide that the responsibility within the executive department of state government for the implementation of programs and policies is clearly fixed and ascertainable; and to eliminate overlapping and duplication of effort within the executive department of state government.[15]

The nineteen departments absorbed the duties and functions previously performed by 188 boards, departments, bureaus and agencies as far as possible. Of the nineteen departments, ten are headed by single administrators and nine are headed by multi-member bodies. The nineteen departments are:

Directed by Single
Administrator

Department of Law Enforcement and Public Safety
Department of Intergovernmental Relations
Department of Institutions
Department of Social and Rehabilitation Services
Department of Agriculture
Department of Military Affairs
Department of Professional and Occupational Licensing

Department of Labor and Industry
Department of Business Regulation
Department of Administration

Directed by
Multi-member
Board

Department of Public Service Regulation
Department of Health and Environmental Sciences
Department of State Lands
Department of Natural Resources and Conservation
Department of Livestock
Department of Fish and Game
Department of Highways
Department of Revenue
Department of Education

Of the ten departments headed by single administrators nine are headed by gubernatorial appointees, including the Department of Business Regulation which is headed by the state examiner, a constitutionally created office. The Department of Law Enforcement and Public Safety is headed by the attorney general, an elective constitutional office.

Of the nine departments headed by multi-member boards, four (Department of Health and Environmental Sciences, Department of Natural Resources, Department of Highways and Department of of Revenue) have directors appointed by the governor to administer the department with the "concurrence" of the governing board. The Department of State Lands has a commissioner who is gubernatorially appointed but subject to the direction of the Board of Land Commissioners.

Two of the nineteen departments, the Department of Agriculture and the Department of Labor and Industry, are created constitutionally. The following five boards have absorbed the duties and functions of a constitutionally created office or are directed by a constitutionally created entity: the Department of Business Regulation (headed by the state examiner), the Department of Administration (containing the Board of Examiners), the Department of Education (headed by the State Board of Education), the Department of Revenue (headed by the State Board of Equalization) and the Department of State Lands (headed by the State Board of Land Commissioners).

The directors of departments headed by single executives who are not elected or otherwise chosen are appointed by the governor subject to senate confirmation. The directors serve at the pleasure of the governor. The same selection procedure is followed when the governor chooses an administrative director for agencies nominally headed by multi-member boards.

Under Revised Codes of Montana, 1947, Section 82A-105, the governor "shall formulate and administer the policies of the executive department of state government. In the execution of these policies, the governor has full powers of supervision, approval, direction and appointment over all departments and their units" except those provided for in the Constitution or exempted by statute.

Executive reorganization under Revised Codes of Montana, 1947, Title 82A, did not and could not alter the basic status of any of the constitutionally created boards or the seven constitutional offices. Such reorganization would require constitutional revision. However, the act did result in some internal reorganization for some of these constitutional bodies. For specific action, see the section of this chapter on constitutional administrative officers and agencies.

The Nineteen Departments

The nineteen departments and their functions as created under Revised Codes of Montana, 1947, Title 82A, are briefly discussed below.[16] The chapter within Title 82A in which the department is created is noted in parentheses. The structure of the executive branch prior to executive reorganization is shown in Table 1; the structure proposed by the Commission on Executive Reorganization in Table 2, and the structure adopted by the 1971 Legislature in Table 3.

Department of Administration (Chapter 2)

The purpose of the Department of Administration is to centralize and consolidate the general administrative, management and fiscal functions of state government. The major functions of the Department include accounting; budgeting; purchasing; data processing; general services; architecture and engineering; administration of a merit system for certain federally funded state agencies (through the Merit System Council); administration of state-sponsored retirement programs and Social Security coverage (through the Teachers' and PERS Retirement Boards);

investment of state funds (through the Board of Investments), and administration of contracts under the long range building program (through the Board of Examiners).

Department of Agriculture (Chapter 3)

The enforcement of agriculture-oriented laws to protect farmers and consumers and the promotion of the agricultural industry are the primary purposes of the Department of Agriculture. The principal functions of the department are enforcement and regulation of certain phases of the agricultural industry; maintenance of comprehensive agricultural statistics; regulation of commercial feeds and fertilizers; grain inspection and grading; horticultural inspection and quarantine service; wheat research and marketing (through the Wheat Research and Marketing Committee); agricultural marketing coordination, and pesticide regulation.

Department of Business Regulation (Chapter 4)

The Department of Business Regulation has as its primary purpose the enforcement and administration of state statutes regulating certain industries and businesses in the state. The primary functions of the department are regulation of banks, building and loan associations, credit unions and consumer loan companies; regulation of weights and measures; packaging and labeling regulation; petroleum testing and regulation of petroleum pumps and meters; enforcement of the Unfair Trade Practices Act and food store licensing (through the Board of Trade), and regulation of liquid milk product marketing, in conjunction with the Board of Milk Control.

Department of Education (Chapter 5)

The Department of Education has as its primary purpose the supervision of state educational facilities. The educational functions to be supervised are the university system, the Montana School for the Deaf and Blind, the junior and community colleges and post-secondary vocational-technical centers. In addition, the specialized functions of historical preservation, promotion of the arts and maintenance of the state library will be administered under the department. The latter functions will be carried on under the advice or direction of the Historical Society Board of Trustees, the Montana Arts Council and the

State Library Commission, respectively.

Department of Health and Environmental Sciences (Chapter 6)

The primary purpose of this department is to protect the health of the citizens of the state and to provide health care services throughout the state. The department will perform functions in the areas of air and water pollution control, environmental sanitation, child health services, dental health, disease control, health education, hospital and medical facilities, laboratories, nursing, records and statistics, local health services and services to reach persons dependent on alcohol and drugs.

Department of Highways (Chapter 7)

The principle purpose of the Department of Highways is to provide and maintain an adequate system of highways in the state. Its functions are highway planning and design, highway construction, highway maintenance and certain special functions such as regulation of gross vehicle weights on state highways, management of a state motor pool, regulation of proportional registration and taxation of interstate carriers and promotion of the state tourist industry.

Department of Institutions (Chapter 8)

The purpose of the Department of Institutions is to provide institutional care to persons requiring such care. The functions of the department are administration of eleven state institutions (Galen State Hospital, Center for the Aged, Montana Children's Center, Mountain View School, Pine Hills School, Boulder River School and Hospital, Warm Springs State Hospital, Montana State Prison, Montana Veterans' Home, Swan River Youth Forest Camp and Eastmont Training Center); provision of post-release services to institutionalized individuals; reimbursement to the state of the cost of institutionalized care; administration of the probation and parole system (through the Board of Pardons), and administration of the statutory provisions regarding voluntary sterilization (through the Board of Eugenics).

Department of Intergovernmental Relations (Chapter 9)

The primary purpose of the Department of Intergovernmental Relations is to act as a conduit for the receipt of federal funds and to function as an official liaison in relations with the federal government, local government and other state governments. The functions of the department involve planning and economic development aimed primarily at local units of government; highway traffic safety planning; coordination of federal, state and local programs designed to alleviate poverty; coordination of programs directed at the Indian population; regulation and promotion of aeronautics (in conjunction with the Board of Aeronautics), and regulation of accounting, budgeting, printing and general fiscal control methods of political subdivisions.

Department of Labor and Industry (Chapter 10)

The purpose of the Department of Labor and Industry is to protect and provide for the economic and physical welfare of the present and potential wage earners of the state. The functions of the department are to administer the unemployment insurance program, the employment service program, the labor standards and compliance program, the workmen's compensation program and the occupational and industrial safety program.

Department of State Lands (Chapter 11)

The Department of State Lands is to manage lands granted to the state by the federal government so as to achieve maximum sustained return to the trust. The functions of the department include development of state land to increase its value; the lease of state lands for grazing, agricultural and mineral uses, and the sale of state land and minerals.

Department of Law Enforcement and Public Safety (Chapter 12)

The Department of Law Enforcement and Public Safety was created to protect citizens through enforcement of civil and criminal laws and through programs designed to provide for the public safety. Department functions include the provision of legal services for and representation of state agencies; criminal identification and investigation; operation of the law enforcement teletypewriter communications system; supervision of the law enforcement academy; adoption and enforcement of fire safety building and electrical codes; registration of motor vehicles; issuance of drivers' licenses; enforcement of motor vehicle laws, and technical and financial assistance to law enforcement agencies (through the Crime Control Commission).

Department of Livestock (Chapter 13)

The purpose of the Department of Livestock is to exercise general supervision over the livestock industry and to protect livestock from theft and disease. The functions are enforcement of livestock laws, including the registration of marks and brands; rabies control; predatory animal control; disease control, and dairy, egg and milk inspection, control and regulation.

Department of Military Affairs (Chapter 14)

The Department of Military Affairs was created to provide maximum protection of life and property; to minimize and aid in the recovery from injury and damage caused by a nuclear or natural disaster, and to maintain order and assure continuity of state and local government. The functions of the department include toperation of a trained and equipped National Guard and the supervision of the civil defense program.

Department of Natural Resources and Conservation (Chapter 15)

The purpose of the Department of Natural Resources and Conservation is to preserve or conserve the natural resources of the state, except for fish and game and land disturbed by mining operations. The functions of the Department are to coordinate the development and use of water resources; to develop, protect and conserve forests on private and state land; to provide for the conservation of soil and soil resources; to promote efficient range management and preservation, and to ensure that the state's oil and gas resources are conserved (through the Board of Oil and Gas Conservation).

Department of Professional and Occupational Licensing (Chapter 16)

The purpose of the Department of Professional and Occupational Licensing is to centralize the administrative operations of twenty-seven professional and occupational licensing boards. The functions of the department, which are carried out in conjunction with the boards, are the promulgation and enforcement of rules and regulations; setting of qualifications and subsequent examination and licensing of applicants; collection of fees, and general supervision of the various professions and occupations.

Department of Public Service Regulation (Chapter 17)

The Department of Public Service Regulation has as its primary purpose the assurance to the public of safe and dependable public transportation and utility services at reasonable rates. The functions of the Department are regulation, rate-setting and safety inspection of railroads, motor carriers, public utilities and pipelines.

Department of Revenue (Chapter 18)

The primary purpose of the Department of Revenue is to collect revenues for the operation of state government. The functions of the Department are supervision of property tax collections by the counties, including the adjustment and equalization of the valuation of taxable property in the state; assessment of intercounty property; collection of personal income taxes, corporate license taxes, cigarette and tobacco taxes, motor fuel taxes, inheritance and estate taxes and miscellaneous taxes and revenues, and administration of the state liquor monopoly (through the Liquor Control Board).

Department of Social and Rehabilitation Services (Chapter 19)

The purpose of the Department of Social and Rehabilitation Services is to provide supportive and rehabilitative services to persons unable to provide such services for themselves. The functions of the Department are provision of economic assistance; social services; services to the blind, aged and veterans, and vocational rehabilitation services.

Department of Fish and Game (Chapter 20)

The Department of Fish and Game has as its purpose the conservation and management of wildlife and the preservation of state parks and recreational areas. The functions of the department are issuance of fishing, hunting and related licenses; enforcement of fishing and hunting laws and regulations; construction and maintenance of state parks and recreational areas, and production, management and protection of wildlife.

INITIATIVE IN REORGANIZATION

The Executive Reorganization Act provides:

> If an agency or a function of an agency established after the effective date of this chapter is not allocated or transferred to a department or a constitutional office by this act or any other act of the legislative assembly, the governor shall, by executive order, allocate that agency or function to the appropriate principal department or unit created by this or any future act.[17]

The wording of this section giving the governor organizational powers is substantially different and more restrained than the wording of the constitutional provision for gubernatorial organization proposed by the Legislative and Executive Subcommittee to the Montana Constitution Revision Commission:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. Such orders shall be submitted to the legislature, which shall have sixty days of a regular session, or a full session if of shorter duration, to express its disapproval. Unless modified or disapproved by resolution concurred in by a majority of the members of both houses, the orders shall become effective at a date thereafter to be designated by the governor.[18]

Instead of constitutionally providing for reorganization by the governor, a few states have followed the example of the federal government which in 1939 and 1949 provided the President with statutory authority to reorganize the administrative structure at the national level subject to Congressional disapproval.

Proponents of vesting power in the governor to initiate reorganization argue that the governor's position as a leader of the executive branch makes him more qualified than the legislature to oversee the administration and to initiate change. Furthermore, the legislature effectively retains reorganizational powers anyway because any extensive reorganization must be submitted to that body. Finally, the power to initiate reorganization would aid in the achievement of administrative efficiency.[19]

Opponents of such gubernatorial initiative argue that the structuring of government is a legislative responsibility, and the legislature therefore should exercise the primary role in organizing the administrative structure of government.[20]

CEILING ON DEPARTMENTS

Ferrel Heady, writing for the National Municipal League, lists among the "tools of management" for state government a constitutional ceiling on the number of executive departments.[21] Another authority has declared:

> If the authority of the governor to direct and supervise is to be effective, the number of agencies he administers must be manageable. The creation of an unwieldy number of agencies in state governments from the close of the Civil War until 1917 was one of the chief contributors to the early reorganization movement. Though no formula exists for discovering the "one best number" of departments . . . the 9 to 20 figure can be taken as reasonable. Whatever the maximum number is, it should be stated in the constitution as a means of preventing the legislature from bowing to the various pressures opposed to integration. The names of departments should not be specified in the constitution, however, since such listing will make the administrative structure rigid. Within the constitutional maximum, the governor and the legislature should establish the departmental structure through formal statutory action.[22]

A constitutional limit on the number of principal state departments should tend to lessen the somewhat natural legislative tendency to create additional administrative agencies and, in the opinion of at least one observer, would have the salutory effect "of compelling a continuing or periodic review of the state administrative structure."[23]

However, it also is contended that a constitutional ceiling on departments is arbitrary and undesirably rigid. Furthermore, it is cautioned that a constitutional limit may in fact blur lines of functional jurisdiction: "To avoid exceeding the ceiling, many states may merge disparate agencies having no functional relationship whatsoever."[24] Indeed, it would appear that this fear has been realized in the state of New York. Finally, opponents of a constitutional limit argue it could better be provided by statute, which would have the advantage of greater flexibility.

If it is determined that the number of principal administrative departments should be limited, consideration also must be given to whether exceptions to the limit should be allowed for temporary agencies. It is argued that temporary agencies allow flexibility and enable the state to respond to the need for programs of limited duration.[25]

The Executive Reorganization Act authorizes the creation of advisory councils limited in duration to two years or the period required to receive federal or private funds; in addition, the existence of any advisory council may be extended as many times as necessary.[26]

SINGLE VS. MULTI-MEMBER DEPARTMENT HEADS

A. E. Buck, in his 1938 study of state government reorganization, listed as one standard of reorganization "the undesirability of boards for purely administrative work." He contended that boards divide authority and generally lack initiative and responsibility.[27]

In 1958, the Western Governors' Conference took the position that having administrative duties performed by

> single officials responsible to the chief executive . . . results in greater speed and flexibility of decision-making, clearer lines of responsibility and accountability and increased facility of policy coordination.
>
> On the other hand, problems of adjudication and advice have been regarded as a responsibility of more than one person. Accordingly, there appears to be wide agreement that boards or commissions should be used for advisory, quasi-legislative, or quasi-judicial purposes either within departments or as advisory bodies outside the regular departments.[28]

The Council of State Governments notes that "in cases where an agency has significant quasi-legislative or quasi-judicial functions, a board can be justified, but the operating affairs of the agency should be administered through a single executive."[29]

MERIT SYSTEM

The Convention may want to consider constitutionally requiring the establishment of a merit system for all personnel in state government below the level of department head.

In addition to protecting against the spoils system, another prime objective of the merit system is to assure competent state employees through standardized rules, regulations and procedures governing recruitment, selection, promotion and pay scale of employees.

Although a personnel commission was established in the state in 1953, and although a few agencies of the state must select their personnel on the basis of merit in order to receive federal funds, Montana never has had a comprehensive operational merit system.[30] A constitutional requirement for the establishment of a merit system therefore may be appropriate if the Convention determines that a merit system is desirable. A detailed constitutional provision probably is unnecessary, however, for such detail tends to impose rigidity.

CONSTITUTIONAL ADMINISTRATIVE OFFICERS AND AGENCIES

Constitutional Officers

In addition to the offices of governor and lieutenant governor, the offices of secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction are created in Article VII, Section 1 of the Montana Constitution. Under that section, each officer serves a four-year term "or until his successor is elected and qualified," and is required to reside in the capital city[31] and to perform duties prescribed by the Constitution or statute.

Article VII, Section 2 provides for the election of these officers. Article VII, Section 4 sets their compensation (which, in accord with the section, has since been changed by law), and provides that the compensation "shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office." It also prohibits any increase in salary during the officers' terms and forbids dual officeholding. Article VII, Section 7 directs the governor to fill by appointment a vacancy in the offices of secretary of state, auditor, treasurer, attorney general or superintendent of public instruction.

Article VII, Section 10 authorizes the governor to "require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath." Article VII, Section 19 requires:

> An account shall be kept by the officers of the executive department . . . of all moneys received by them, severally from all sources, and for every service performed, and of all moneys disbursed by them severally, and a semi-annual report thereof shall be made to the governor, under oath; they shall also, at least twenty days preceding each regular session of the legislative assembly, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislative assembly.

Under Article V, Sections 16 and 17, the officers are subject to impeachment.

Secretary of State

Under Article VII, Section 3 of the Montana Constitution, the secretary of state must be at least 25 years old, a United States citizen and a Montana resident for two years prior to his election. Currently, the salary of the secretary of state is $15,000.[32]

Article VII, Section 12 provides that bills not approved by the governor after final adjournment of the legislature shall be filed with the governor's objections in the office of the secretary of state.

Article VII, Section 17 provides for the "great seal of the state of Montana;" the secretary of state is authorized to use the seal officially and is designated keeper of the seal. Under Article VII, Section 18, grants and commissions are countersigned by the secretary of state and sealed with the great seal.

Under Article VII, Section 20, the secretary of state is a member of the Board of State Prison Commissioners and the Board of Examiners; under Article XI, Section 4, he serves on the State Board of Land Commissioners.

Article XV, Section 8 declares:

> No railroad, express, or other transportation company, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, without first filing in the office of the secretary of state an acceptance of the provisons of this constitution in binding form.

Clearly, this is an obsolete provision which could be removed from the Constitution.

Article XIX, Section 9 directs the secretary of state to publish proposed constitutional amendments "in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly." In Article XXI, Section 4, the secretary of state is instructed to keep a duplicate of the record kept by the state treasurer of all "gifts, donations, grants and legacies" to the Montana Trust and Legacy Fund.

The duties of the secretary of state, exclusive of his constitutional board memberships, have been categorized into three areas: record-keeping, election and legislative duties.[33]

The office is the main depository for public documents, and the secretary of state serves as chief elections officer in the state and performs such legislative services as presiding at the biennial opening of the house of representatives and registering legislative lobbyists. Articles of incorporation for business and non-profit corporations are filed with the secretary of state. The 1971 annual report of the secretary of state to the governor summarized the duties of the office:

Subject	Code or Constitutional Reference
Custodian of public and state records and great seal	Title 82, Chapter 22
General and miscellaneous duties	Title 82, Chapter 22
Legislative proceedings	Title 43, Chapter 9
Lobby licensing	Title 43, Chapter 8
Corporation officer	Titles 5, 7, 9, 11, 15, 16, 35, 40, 72 and 76
Elections officer	Titles 23 and 94
Initiative and referendum measures	Title 37
Notary public law	Title 56, Chapter 1
Trade name and marks	Title 85, Chapter 1
Geophysical bonds	Title 69, Chapter 33
Textbook bonds	Title 75, Chapter 76
Service of process	M.R. Civ. P., Rule 4 D (2)
Soil and water districts	Title 76, Chapter 1
Deeds to state property	Title 82, Chapter 22
Distribution of official publications:	
Session Laws	Title 82, Chapter 22
House and Senate Journals	Title 82, Chapter 22
Revised Codes and pocket supplements	Title 12, Chapter 3

Montana Supreme Court Reports	Title 82, Chapter 20
Election laws	Title 23, Chapter 29
Oaths of office	Title 59, Chapter 4
Uniform commercial code	Title 87A, Chapter 9
Administrative procedure act	Title 82, Chapter 42

Executive reorganization under Revised Codes of Montana, 1947, Title 82A did not alter the structure of the office of secretary of state; such a move would have required constitutional revision. However, the act did result in some internal reorganization. The duty of registering machine guns (assigned the secretary under Revised Codes of Montana, 1947, Sec. 94-3108) was transferred to the Department of Law Enforcement and Public Safety [Revised Codes of Montana, 1947, Sec. 82A-1203] and the annual collection of rural electric and telephone cooperative license taxes (assigned the secretary in Revised Codes of Montana, 1947, Sec. 14-528) was transferred from the secretary to the Department of Revenue [Revised Codes of Montana, 1947, Sec. 82A-1802].

For a discussion of the office of secretary of state throughout the United States and various alternative proposals for changing the office, see James T. Havel, "Persisting Problems and Proposals for Reform," in the Appendix to this report.

Attorney General

Article VII, Section 3 of the Montana Constitution requires that an attorney general must be at least 30 years old, a resident of the state for two years preceding his election, a United States citizen, and admitted to practice before the Montana Supreme Court. The current salary for the attorney general is $19,000.[34]

Under Article VII, Section 20, the attorney general is a member of the Board of State Prison Commissioners and the Board of Examiners. He also is a member of the State Board of Land Commissioners under Article XI, Section 4 and of the State Board of Education under Article XI, Section 11.

Except for his membership on those boards, the Constitution assigns no specific duties to the attorney general. Rather, his duties are assigned by law; they are numerous, varied and scattered throughout the Revised Codes.[35] General duties are prescribed in Revised Codes of Montana, 1947, Section 82-401; in addition, the Montana Supreme Court has held that in the absence of express constitutional or statutory restrictions, the attorney general has common law powers.[36]

The attorney general serves as legal adviser to the governor, the legislature and other state offices and agencies, as well as to local officials; he represents the state in actions in which the state or an agency of the state is a party. In this capacity, the attorney general issues official written opinions interpreting the laws of the state; although these opinions do not have the force of law, they are authoritative and legally binding unless overturned by judicial decision.

The attorney general is the chief law enforcement officer of the state, even though the office of attorney general is more involved in civil than criminal matters. Thus, the attorney general has supervisory powers over all county attorneys, who have the primary duty of enforcing criminal laws. In addition, the attorney general represents the state in all criminal appeals to the Montana Supreme Court, federal district courts and the United States Supreme Court.

Other important duties of the attorney general are handling escheated estates and examining bond issue proceedings.

Executive reorganization under Revised Codes of Montana, 1947, Title 82A made the attorney general head of the Department of Law Enforcement and Public Safety.[37]

For a fully developed discussion of whether the office of attorney general should be elective or appointive, see Byron R. Abernathy, "The Attorney General," in the Appendix to this report.

State Treasurer

Article VII, Section 3 of the Montana Constitution prescribes the minimum qualifications for the state treasurer: at least 25 years of age, United States citizenship and residency in the state for two years or more. Nowhere is the treasurer required to have any financial or administrative expertise or experience. Presently, the salary of the state treasurer is $15,000.[38]

Under Article VII, Section 1 of the Constitution, the state treasurer is ineligible to his office for the succeeding term; he is the only constitutionally created officer who is enjoined from succeeding himself. The constitutionally enumerated duties of the treasurer are contained mainly in Article XII, Section 13:

> The state treasurer shall keep a separate account of each fund in his hands, and shall at the end of each quarter of the fiscal year report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place or places where the same is kept or deposited, and the number and amount of every warrant paid or redeemed by him during the quarter . . . . The legislative assembly may provide by law further regulations for the safe keeping and management of the public funds in the hands of the treasurer; but notwithstanding any such regulations, the treasurer and his sureties shall in all cases be held responsible therefor.

The treasurer does keep a separate account of each fund in his hands, but the constitutional provisions for reporting to the governor are no longer observed.[39] In accord with this constitutional provision, the legislature has provided by law "further regulations for the safe keeping and management of public funds in the hands of the treasurer."

Additional constitutional provisions affecting the office of state treasurer are found in:

--Article VII, Section 8, which provides that the state examiner is to examine the accounts of the state treasurer;

--Article VII, Section 20, which provides that the legislature "may provide for the temporary suspension of the state treasurer by the governor, when the board of examiners deem such action necessary for the protection of the moneys of the state;"

--Article V, Section 30, which provides that certain state contracts are subject to the approval of the governor and state treasurer;

--Article XII, Section 14, which designates the state treasurer as a member of the State Depository Board and further provides:

> When money shall have been deposited under direction of said depository board and in accordance with the law, the treasurer shall not be liable for loss on account of any such deposit occurring through damage by the

> elements or for any other cause or reason occasioned through means other than his own neglect, fraud or dishonorable conduct. The making of profit out of public moneys, or using the same for any purpose not authorized by law, by the state treasurer or by any other public officer, shall be deemed a felony, and shall be punished as provided for by law and part of such punishment shall be disqualification to hold any public office.

--Article XXI, Section 4, which directs the state treasurer to keep a permanent record of all gifts, donations, grants and legacies to the Montana Trust and Legacy Fund "showing the names of the givers, the purpose of the contribution, and other essential facts relating thereto;"

--Article XXI, Section 9, which provides:

> On the last day of March, of June, of September and of December of each year, the state treasurer shall apportion all interest collected for the Montana trust and legacy fund during the three month period then terminating to all the separate and integral funds which constitute such fund on the day of such apportionment and which constituted parts of the fund on the first day of the three month period then terminating. The basis of apportionment shall be the average amount of each such fund between the first day and the last day of the three month period;

--Article XXI, Section 10, which provides

> The state treasurer shall keep all deposits of money belonging to the Montana trust and legacy fund separate and distinct from other deposits of money in his keeping.

In addition to these constitutional provisions, various laws charge the office of state treasurer with the custodianship of state moneys. Revised Codes of Montana, 1947, Section 79-201 provides:

> The state treasurer shall be the custodian of all moneys and securities of the state unless otherwise expressly provided by law, and it is the duty of the state treasurer:
>
> 1. To receive and account for all moneys belonging to the state, not expressly required by law to be received and kept by some other person . . . .

The section also prescribes other general fiscal duties of the treasurer, including issuance of receipts for all moneys paid into the treasury, payment of warrants and keeping an account of moneys received and disbursed. In Revised Codes of Montana, 1947, Section 79-306, the state treasurer is specifically designated as the treasurer of all state boards, commissions, bureaus, departments and institutions.

Nine basic treasury funds were established by the Treasury Fund Structure Act of 1963 [Revised Codes of Montana, 1947, Title 79, Ch. 4]. Most state agencies are financed from these funds, and the financial transactions of most agencies flow through them. The principal function of the treasurer is to account for receipts, disbursements and balances in these funds, which consist of independent fiscal and accounting classifications. Usually, the determination as to the fund in which to record transactions is made by the various state agencies;[40]

> however, the treasurer verifies, to a limited extent, that the transactions are appropriate. For the most part, however, the treasurer functions in much the same manner for the state as a commercial bank does for a business by receiving and safeguarding money, and paying it upon demand.[41]

In 1962 the Legislative Council, after examining the operation of the treasurer's office, recommended that the constitutional status of the state treasurer be eliminated. The Council said the purpose of the recommendation was "to enable the legislature to provide for a qualified, appointive official to assume responsibility for operating the state treasury and supervising investments."[42]

The Executive Reorganization Act of 1971 transferred the investment functions of all state agencies including the treasurer to a central investment section of the Department of Administration under the supervision of a Board of Investments.[43] By separate legislation the responsibility of the treasurer for administration of escheated estates[44] and abandoned property[45] was transferred to the Department of Revenue.

A recent legislative auditor's report indicated several problems in the office of state treasurer. Among other items, the report states:

> In the case of the treasurer, we found a noticeable absence of proper accounting and reporting procedures. The treasurer does not have a system of general accounting and financial reporting to adequately account for

> and disclose its activities. The treasurer does not maintain a general ledger, the basic accounting record of any business or governmental unit, nor does it utilize the double entry system of accounts, one of the most basic accounting techniques.[46]

Citing the statutory designation of the state treasurer as treasurer of all state agencies, the report declares:

> Irrespective of the requirements of this law, our examination disclosed that in many instances, state funds are being received and disbursed by many agencies outside of, and without the cognizance of the treasurer. In numerous other instances, the treasurer is notified of fund transactions only after the fact.[47]

These and other examples given in the report were said to illustrate two basic points:

> (1) Provisions of law are not being adhered to, and
> (2) The state treasurer is not the state treasurer, in the sense that significant state moneys never pass through the treasury.[48]

State Auditor

Article VII, Section 3 of the Montana Constitution provides that the auditor must be at least 25 years old, a United States citizen and a resident of Montana for two years prior to his election; no other qualifications--such as education or experience--are prescribed for the office. Under the provisions of Article XII, Section 14 the auditor is a member of the State Depository Board; the Constitution assigns no other specific duties to the auditor. The present salary of the state auditor is $15,000.[49]

Despite the title, the state auditor does not audit, either by statute or in actual practice. Rather, the auditor had been the bookkeeper for the state; this bookkeeping function is an operation entirely separate from the audit function and is now performed by the Department of Administration.

Although the auditor has authority in his discretion "to inspect the books of any persons charged with the receipt, safekeeping, or disbursement of public moneys,"[50] he does not conduct either pre- or post-audits of state agencies. Responsibility for post-auditing the state treasurer, clerk of the Supreme Court, district court clerks and county and municipal agencies is vested in the state examiner by both constitutional and statutory provisions.[51] In addition, since the creation of the office in 1967, the legislative auditor has been responsible for post-auditing of state agencies.[52] However, it is important to note the comment of the Montana Commission on Executive Reorganization:

> The Audit activity of the Auditor's Office has been diminished by legislative action over a long period of time. However, this Office is the only post audit authority remaining in the executive branch of state government. The Auditor has the power to inspect all books, papers and accounts of all agencies and to take action against defaulters. The Legislative Auditor, on the other hand, can "recommend and suggest" but has no power to enforce.[53]

Although the office of state auditor originally was created to superintend the fiscal affairs of the state, the legislature has assigned the fiscal duties originally performed by the auditor to the state controller and Department of Administration; in effect, the Department of Administration, not the state auditor, is now the state bookkeeper. The auditor is now directed to "keep an account of all warrants drawn upon the treasurer, and such other account and appropriation records that he determines to be essential for the support of the accounting records maintained in the office of the state controller."[54] The state auditor continues to be the disbursement officer for state warrants and the state centralized payroll; however, most warrants issued by the auditor and central payroll are actually written by computer in the Department of Administration. In addition:

> The Auditor's Office maintains records of written and outstanding warrants, disburses or mails the warrants to the payees and maintains fund and account balances which are checked with the Treasurer and Controller balances. (For the most part the sources used by the Auditor, Treasurer and Controller for posting to the funds and accounts are identical so that the checking process serves to correct numerical errors but provides no internal accounting control.)[55]

Although the majority of state payments are made through the use of state warrants, for which the auditor is chief disbursement officer, significant disbursements are made by several agencies by means of their own checking accounts. When the legislative auditor audited the office of state treasurer, at least five agencies drew funds on the treasury through the use of sixteen separate checking accounts. The checks drawn on these accounts were not centrally issued and were not a part of the state's claim/warrant system.

While his financial duties have been reduced until he now has only minimal responsibility regarding disbursement of warrants, preparation of the central payroll and maintenance of certain financial records, the state auditor has been given other important statutory duties not financial in nature. By statute, the state auditor has been given ex officio responsibilities as commissioner of insurance[56] and investment commissioner.[57] Prior to the Executive Reorganization Act of 1971, the auditor also was ex officio state fire marshal. The Montana Commission on Executive Reorganization recommended that all these non-financial duties be transferred to other agencies. The legislature transferred the fire marshal to the Department of Law Enforcement and Public Safety[58] but did not transfer the responsibilities of the auditor as ex officio commissioner of insurance and investments to the Department of Business Regulation, as was recommended.[59]

The constitutional status of the auditor has not made the state auditor an "auditor" in fact. Neither has the constitutional status of the office prevented the legislature from transferring most of its financial duties to a non-constitutional agency--the Department of Administration--headed by a professional, or from assigning non-financial duties to the office. The Constitutional Convention probably will want to consider whether an office primarily involved in the regulation of insurance companies and corporate investments warrants constitutional status as an elective office. If the office is retained, the Convention may want to consider whether the auditor should, in fact, be made an auditor, or perhaps whether the elected auditor should be replaced by a legislative auditor responsible to and chosen by the legislature.

Superintendent of Public Instruction

Constitutional qualifications for the office of superintendent of public instruction are contained in Article VII, Section 3 of the Montana Constitution and require the superintendent to be at least 30 years old, a resident of Montana for two years preceding his election and a U.S. citizen. In addition, Revised Codes of Montana, 1947, Section 75-5702 requires "at least a bachelor's degree from any unit of the Montana university system or from an institution recognized as equivalent by the board of education for teacher certification purposes." At present the salary of the superintendent of public instruction is $17,500.[60]

The superintendent is a member of the State Board of Land Commissioners under Article XI, Section 4 and an ex officio member of the State Board of Education under Article XI, Section 11. No further duties are assigned the superintendent by the Constitution; however, numerous duties and responsibilities are assigned by statute.[61] In general, the superintendent is responsible for supervision of elementary and secondary schools in Montana.[62]

There is considerable confusion as to the relation between the superintendent of public instruction and the State Board of Education and their respective powers and responsibilities. The Montana Supreme Court, in State ex rel. School District No. 29 v. Cooney [102 Mont. 521, 525, 526, 59 P.2d 48 (1936)], declared that Article XI, Section 11 of the Constitution "vests in the state board [of education] general control over and supervision of all state educational matters, including district and high schools" and that by statute," the superintendent has supervision of all public schools of the state, subject to general supervision of the state board." The Montana Commission on Executive Reorganization found that:

> In actual practice the State Board of Education exercises supervision and control over some eucational programs and in other cases gives routine approval to actions cr recommendations of the Superintendent of Public Instruction.[63]

The Commission said the Board generally leaves most public school matters to the discretion of the superintendent. To quote the Commission: "the lines of authority and control (Superintendent of Public Instruction vs. State Board of Education) in regard to elementary and secondary schools are presently very unclear."[64] In order to clarify this situation, the Commission recommended to the 1971 Legislature that""the superintendent is generally responsible, under the general supervision of the state board of education, for all matters relating to the public schools of the state."[65] Such subordination of the superintendent of public instruction to the State Board of Education was not accepted by the legislature, however. For further information and discussion of the relative merits of an appointive or elective superintendent of public instruction, see the study on education in this series of reports for the Constitutional Convention.

Constitutional Departments and Appointed Officials[66]

State Examiner

The Montana Constitution provides for the state examiner in Article VII, Section 8:

> The legislative assembly shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, and all county treasurers and treasureres of such other public institutions as may be prescribed by law, and shall perform such other duties as the legislative assembly may prescribe. He shall report at least once a year and oftener if required to such officers as may be designated by the legislative assembly. His compensation shall be fixed by law.

Under the constitutional provision, the state examiner is charged with audit responsibility for certain state and local officers. The Constitution prescribes that the state examiner examine the accounts of the state treasurer, supreme and district court clerks, county treasurers and treasurers of other public institutions as prescribed by law. Under that constitutional grant, the legislature provided that the examiner also audit the books of county clerks, assessors, auditors, sheriffs, public administrators and commissioners and all other county and municipal officers, boards and institutions.

In 1923, the legislature without specific constitutional authorization, also established the state examiner as the ex officio superintendent of banks and ex officio consumer loan commissioner.[67] Under that responsibility, the examiner audits all state banks, building and loan associations and agents, credit unions and consumer loan businesses.[68]

Thus, the state examiner was first a governmental auditor and later, by legislative fiat, became the state bank examiner. The responsibilities of the state examiner as bank examiner, grew to the point that, by 1970, 56 percent of his staff was assigned to the municipal division and 40 percent to the banking division (the remaining 4 percent was shared clerical staff).[69] The organization and operation of the state examiner's office prior to executive reorganization is discussed in detail in the Commission on Executive Reorganization staff report on business regulation.[70]

Prior to 1967, the Revised Codes of Montana, 1947, Section 82-1002, charged the state examiner with the responsibility to examine

> at least once in each year the books and accounts of the state treasurer, state auditor, secretary of state, clerk of the supreme court, state game warden, register of state land office and all other state officers having the collection or handling of state money. . . .

The creation of the legislative auditor in 1967, and his assumption of auditing responsibilities for state agencies, relieved the examiner of this function. However, both the statutes and the Constitution continue to specify that the examiner is to check the accounts of the state treasurer and Supreme Court clerk.[71] Thus, in 1967 the state examiner's governmental auditing was primarily limited to local government units; before 1967 he had also been responsible for state audits.

The Commission on Executive Reorganization recommended that the examination of financial institutions be placed in a new Department of Business Regulation and that the examination and supervision of political subdivisions of the state be placed in a Department of Intergovernmental Relations.[72] The Executive Reorganization Act accomplished this division as far as was possible without constitutional change; the state examiner was made head of the Department of Business Regulation and the statutory functions regarding examination of private financial institutions were assigned to this department.[73]

The examination of all political subdivisions of the state, previously assigned to the examiner by statute, was transferred to the Department of Intergovernmental Relations.[74] But without constitutional change, the duty of the state examiner to examine accounts of the state treasurer, supreme and district court clerks and county treasurers could not be changed; those responsibilities remain with the state examiner,[75] although logically they also should have been transferred.

By administrative action, the state examiner has transferred the duty of examining the records of the state treasurer and clerk of the Supreme Court to the legislative auditor.[76] It is anticipated that, by similar administrative action, the actual examination of district court clerks and county treasurers will be transferred to the Department of Intergovernmental Relations when it is activated. But it will be necessary for the state examiner to retain some administrative control to fulfill the constitutional requirements until the Constitution is amended.

In other words, the constitutionally assigned duties regarding examination of certain political subdivisions of the state are retained in the office of the state examiner, while the legislatively assigned functions regarding examination have been transferred in a manner designed for more efficient governmental operation. The state examiner, originally created as a constitutional officer to audit state and local governmental units, has become the head of a Department of Business Regulation, which has as its primary purpose enforcement and administration of state statutes regulating certain industries and businesses. Because his constitutional duties could not be transferred by statute, the head of the department is still responsible for auditing the accounts of the state treasurer and Supreme Court clerk (although the legislative auditor also has the authority to audit these officials) and the accounts of the district court clerks and county treasurers (although these units of local government logically should be audited by the same unit that will audit all other units of local government--the Department of Intergovernmental Relations).

John A. Dowdall, the state examiner, has made the following recommendations regarding the constitutional status of his office:

> The Montana Legislative Council in Report No. 25 concluded that the state examiner should not be a constitutional officer. We concur in this conclusion, if for no other reason than the Constitution should not be cluttered up with statutory matter.
>
> We recommend that the entire Section be repealed so that the duties described therein may be taken care of by statute.[77]

The executive reorganization office also has recommended that Article VII, Section [illegible] of the Constitution, providing for the state examiner, be repealed. The office noted:

> Repeal of this section would enable the Legislature to transfer examination duties to the department to which the duties are most closely related.[78]

Department of Labor and Industry

Article XVIII, Section 1 of the 1889 Montana Constitution originally provided:

> The Legislative Assembly may provide for a bureau of agriculture, labor and industry, to be located at the capital and be under the control of a commissioner

> appointed by the Governor subject to the confirmation of the senate. The commissioner shall hold his office for four years, and until his successor is appointed and qualified; his compensation shall be as provided by law.

The single bureau of agriculture, labor and industry was divided into two separate departments in 1951 by constitutional amendment:

> The legislative assembly shall provide for a department of agriculture, and a separate department of labor and industry to be located at the capitol and each of said departments shall be under the control of a separate commissioner who shall be appointed by the governor, subject to the confirmation of the senate. Each commissioner shall hold office for four (4) years, and until his successor is appointed and qualified; the compensation of each commissioner shall be as provided by law. The powers and duties of each commissioner shall be prescribed by the legislature.

Since the Constitution does not define the functions of the Department of Labor and Industry, the Convention may want to consider whether the department should be created by constitutional or statutory mandate and whether the Constitution should specify the term of office and method of appointment for the department head.

The executive reorganization office has recommended that the constitutional provision providing for the Department of Labor be repealed. The office commented: "This section should not appear in the Constitution because it restricts the Legislature's authority to organize and reorganize the executive branch."[79]

Prior to executive reorganization in 1971, the Department of Labor was charged by the legislature with

> the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages, protection of employees, all laws relating to child labor regulating the employment of children in any manner and to administer the laws of the state relating to free employment offices.[80]

Due partly to duplication of duties in other executive agencies, partly to a lack of any volume of assigned work and partly to a minimal budget and staff, the department, from 1951 until executive reorganization, lay almost dormant. The Montana Commission on Executive Reorganization found eleven labor functions "being performed wholly or in part by four labor agencies and two non-labor agencies."[81] The agencies were the Employment Security Commission, the Industrial Accident Board, the Department of Labor and Industry, the Commission on the Status of Women (labor agencies); the Board and Department of Health and the Highway Department (non-labor agencies). The eleven functions were unemployment insurance; employment services, including all federal manpower programs; workmen's and occupational disease compensation; occupational health and safety; arbitration and conciliation; apprenticeship training; silicosis compensation; regulation of wage payment, hours and employment practices; regulation of child labor; regulation of discrimination in employment; and volunteer firemen's compensation. The Commission found a "common denominator" among the functions:

> [t]hey are all primarily intended to protect and/or provide for the economic and/or physical welfare of the present or potential wage earners of this state in a manner that is acceptable to both labor and management interests.[82]

The Commission noted:

> At the present time state government's effort to provide for the welfare and protection of the wage earner is divided among eight executive agencies. There is in this state no broad-based agency charged with the comprehensive responsibility for all labor oriented functions. Consequently, there is no coordinated plan for the delivery of services, the identification of problems and the arrangement of priorities in the area of labor.[83]

On the basis of their findings, the Commission recommended that a new Department of Labor and Industry be made solely responsible for the administration and/or enforcement of labor-oriented state and federal laws, executive orders and proclamations; for the welfare of the wage earner, and for insuring that Montana's human resources are properly utilized with respect to gainful employment. The 1971 Executive Reorganization Act transferred the functions of the State Board of Health pertaining to nurses' employment practices and the industrial hygiene laws to the Department of Labor and Industry. The Act also abolished the Apprenticeship Council and its units, and the administratively created Commission on the Status of Women, transferring the functions they performed to the Department of Labor and Industry. The Labor-Safety Study Commission and the State Board of Arbitration and Conciliation were abolished outright. The new department's division of workmen's compensation assumed the powers of the following executive organs: the Industrial Accident Board and its units, including the department of safety (the investment duties of the Industrial Accident Board and its subdivisions were transferred to the Board of Investments); the Advisory Committee on Boiler Rules; Power Line Construction Code Committee; Board of Examiners of Applicants for Coal Mine Foremen and Mine Examiner, and Board of Examiners of Applicants for State Coal Mine Inspectors.

A division of employment security was created within the department to include the bureau of Montana state employment service, bureau of unemployment insurance and other bureaus to be established as required for receipt of federal funds. Each bureau is headed by a full-time chief appointed by the administrator of the division. The Employment Security Commission of Montana was abolished and its functions transferred to this division (except the quasi-judicial functions which were transferred to the new Board of Labor Appeals). The Act created a three-member quasi-judicial Board of Labor Appeals appointed by the governor to hear disputes concerning the administration of Montana's unemployment insurance laws.

Thus, executive reorganization resurrected the old Department of Labor and Industry by consolidating the labor-related functions performed by that department and various state agencies and placing them under the control of an expanded agency. This reorganization in no way altered the constitutional structure of the department, but merely utilized the legislative mandate given in Article XVIII, Section 1 to prescribe the duties of the department. This mandate permitted the legislature to easily reorganize the labor functions to fulfill the Commission's recommendations.

The Department of Labor and Industry, as created by the Executive Reorganization Act, is headed by a single administrator appointed by the governor.[84] Unlike most appointed department heads, the labor head does not serve at the pleasure of the governor because the Constitution [Art. XVIII, Sec. 1] provides he shall serve a four-year term. The Montana Supreme Court has held that under this provision, the incumbent has a right to hold over until his successor has been confirmed by the senate.[85]

It is questionable whether the Department of Labor and Industry--or any other department--should be created by the Constitution. Of the nineteen departments created by the Executive Reorganization Act, only two are constitutional. Three other departments are headed by constitutional boards, and one is headed by a constitutionally elected officer, but the departments themselves are not created in the Constitution.

There are no particular advantages to constitutional status for a department. In fact, the constitutional status of the Department of Agriculture, Labor and Industry, until its split in 1951, was probably detrimental: it required constitutional amendment to split the department, a task that could otherwise have been accomplished by simple legislation. The constitutional term of office specified for the commissioner of labor and industry also prevented the legislature from providing in the Executive Reorganization Act that the head of the Department of Labor and Industry would serve at the pleasure of the governor.

At the same time, the constitutional status of the Department of Labor and Industry did not prevent the proliferation of labor-related boards, bureaus and agencies, nor did it prevent the legislature from consolidating those labor functions into one department in the Executive Reorganization Act.

Both the Montana Legislative Council and the Executive Subcommittee of the Constitution Revision Commission have recommended that the constitutional status of the department be deleted.[86]

Department of Agriculture

The history of the Department of Agriculture parallels that of the Department of Labor and Industry, discussed above. The department originally was part of a "bureau of agriculture, labor and industry" provided for by the original language of Article XVIII, Section 1 of the 1889 Constitution. The bureau was divided into two separate departments--agriculture and labor and industry--by a 1951 constitutional amendment.

The executive reorganization office has recommended that the constitutional provision providing for the Department of Agriculture be repealed.[87] Similar recommendations have been made by the Montana Legislative Council and the Executive Subcommittee of the Constitution Revision Commission.[88] The arguments against constitutional status for the agriculture department are the same as those cited above for the Department of Labor and Industry.

At present, the Department of Agriculture is one of nineteen departments provided for by the Executive Reorganization Act of 1971.[89] The enforcement of agriculture-oriented laws to protect farmers and consumers, and the promotion of the agricultural industry will be the primary purposes of the department. The department also will enforce and regulate certain phases of the agricultural industry; maintain comprehensive agricultural statistics; regulate commerical feeds and fertilizers; inspect and grade grain; provide horticultural inspection, and quarantine service; conduct wheat research and marketing (through the Wheat Research and Marketing Committee); coordinate agricultural marketing, and regulate pesticides.[90]

Constitutional Boards

Board of Pardons

Article VII, Section 9, of the Montana Constitution provides:

> The governor shall have the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction and judgment for any offenses committed against the criminal laws of the state; Provided, however, That before granting pardons, remitting fines and forfeitures, or commuting punishments, the governor shall be advised concerning the same and that such action has been approved by a board, or a majority thereof, who shall be known as the board of pardons. The legislative assembly shall by law prescribe for the appointment and composition of said board of pardons, its powers and duties; and regulate the proceedings thereof.

Prior to constitutional amendment in 1953, the Board of Pardons was an ex officio board composed of the governor, secretary of state and attorney general.

The Probation, Parole and Executive Clemency Act was adopted by the 1955 Legislature in 1955, following the 1953 amendment.[91] The Board of Pardons created by that Act is a three-member board appointed by the governor with the advice and consent of the senate. The members are appointed to six-year terms and the board has authority to administer the executive clemency, probation and parole system.[92] The constitutional section appears to make the governor's pardoning power subject to the approval of the board. (For a discussion of the board's pardon power, a matter on which there is some question, see Cnapter III.)

The Commission on Executive Reorganization found that:

> The Board meets monthly at the central office of the Board located at Deer Lodge. It is basically concerned with holding hearings to determine if inmates

> at the State Prison should be placed on parole, and to determine if a person on parole has violated the conditions of his release. The Board elects a Director of Probation and Parole. It is the Director's responsibility to supervise nine parole officers located in nine major cities in Montana. The pa officers conduct pre-sentence and other investigations as directed by the District Courts or the Board and maintain a head count of all persons released on probation or parole in their respective areas. At the discretion of the officer, parolees and probationers are required to report personally at specified intervals to him and to submit a written report of their activities on a monthly basis to his office.
>
> The Board spends the major portion of its time in hearing cases of persons eligible for parole. The remainder of the Board's time is spent establishing policy for and supervising the activities of the Director and the parole officers. One of the most important supervisory functions of the Board concerns special parole conditions or instructions. When the Board imposes special conditions or instructions before releasing a person on parole, the conditions and instructions are written down on the disposition. The parole officer is expected to enforce and follow these instructions.[93]

The Executive Reorganization Act transferred the Board of Pardons to the Department of Institutions for administrative purposes. The transfer did not affect the board's structure or powers, however. The Commission on Executive Reorganization noted:

> The Board of Pardons performs a legitimate quasi-judicial function, one which directly affects the lives of individuals and one which could not be expected to be performed by a single administrator. The Board, as a necessary follow-through to its own quasi-judicial decisions, also closely supervises the field operations of parole officers. The close tie that exists between the quasi-judicial decisions of the Board and the implementation of these decisions in the field is believed to be both necessary and desirable.[94]

Twenty states create boards of pardons constitutionally, but the degree of constitutional structuring--including assignment of powers--varies with each state. Four states authorize the state legislature to create a board analogous to Montana's Board of Pardons.[95]

The Model State Constitution, Section 5.05, provides:

> The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law.

Commenting on this section, the National Municipal League noted:

> It is the view of responsible legal and penological authorities that, in addition to legal and political considerations, the granting of pardons involves complex judgments of a correctional and behavioral nature and that chief executives are neither trained to exercise such judgments nor can they be expected to have any special interest in doing so. Hence, the Model expresses the view that a state constitution should leave the matter to legislative development. While recognizing clemency powers to be executive in nature, the section permits the governor to delegate them "subject to such procedures as may be prescribed by law." This will leave room for the creation of such expert or professional boards or agencies to deal with matters of clemency as may be appropriate.[96]

A model executive article drafted by the Study Committee on Constitutional Revision and General Government Organization of the 1968 National Governors' Conference does not create a pardons board; rather, it proposes that the governor have

> the power to grant reprieves, commutations, and pardons, after conviction, and may suspend and remit fines and forfeitures, subject to such procedures as may be prescribed by law.[97]

Issues for the Constitutional Convention regarding the pardon power include who shall have the power (governor, a board, governor and a board concurrently, governor subject to a board or a board subject to the governor) and what that power shall encompass (restoration of what rights). While the pardoning power usually is constitutionally granted, it is not necessary to specify the structure and administration of the power.

The executive reorganization office has recommended that Article VII, Section 9 of the Montana Constitution be amended to remove the constitutional status of the Board of Pardons. The office noted such action

> would eliminate the constitutional control of the Board of Pardons over the Governor's authority and

> enable the Legislature to provide for matters of clemency as it deems appropriate.[98]

Following are examples of constitutional provisions from recent state constitutions:

> [Subject] to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit all forfeitures. This power shall not extend to impeachment . . . .[Alaska Const. Art. III, Sec. 21]
>
> The governor may grant reprieves, commutations, and pardons, after conviction, for all offences, subject to regulation by law as to the manner of applying for the same. The legislature may, by general law, authorize the governor to grant pardons before conviction, to grant pardons for impeachment and to restore civil rights denied by reason of conviction of offences by tribunals other than those of this state . . . .[Hawaii Const. Art. IV, Sec. 5]
>
> The governor shall have power to grant reprieves, commutations and pardons after convictions for all cases, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons thereof. [Michigan Const. Art. V, Sec. 14]
>
> The governor may grant pardons and reprieves in all cases other than impeachment and reasons, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency. [New Jersey Const. Art. V, Sec. 2]
>
> [The governor] shall have the power to suspend the execution of sentences in criminal cases and to grant pardons, commutation of punishment, and total or partial remissions of fines and forfeitures for crimes committed in violation of the laws of Puerto Rico. This power shall not extend to cases of impeachment. [Puerto Rico Const. Art. IV, Sec. 4]

Board of Examiners [99]

The Board of Examiners is established by Article VII, Section 20 of the Montana Constitution:

> They [the governor, secretary of state and attorney general] shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly, without first having been considered and acted upon by said board. The legislative assembly may provide for the temporary suspension of the state treasurer by the governor, when the board of examiners deem such action necessary for the protection of the moneys of the state.

The executive reorganization office has recommended the repeal of Article VII, Section 20 providing for the Board of Examiners.[100] The board, once the center of fiscal control and internal management for the state, has been stripped of all its duties except constitutional and statutory duties regarding the planning, financing, administration and construction of state buildings.

Such was not always the case. The 1935 Revised Codes of Montana, for example, listed the following duties for the board:

--Process all claims against the state, settled and unsettled [Sections 238-242];

--Examine the offices of the treasurer and auditor as often as desired [Section 251];

--Prepare and publish a monthly statement of how much money is in the treasury [Section 252];

--Act as furnishing board, contract for all stationery, printing, fuel and lights and provide offices and furnishings [Sections 254-259];

--Employ or authorize employment of all clerical help for any state officer or board [Section 268];

--Set the number and compensation of all assistants, clerks, and stenographers of civil executive officers [Section 274];

--Oversee the functions and duties of the purchasing department [Sections 284-293.13];

--Perform all budget duties for state government [Sections 294-304];

--Appoint a capitol custodian and supervise his work [Sections 310-319];

--Control and supervise the state tuberculosis sanitarium [Section 1524].

That list, although not complete, indicates the broad scope of the Board of Examiners at one time. Since 1935, most of the fiscal control and internal management of the state has been reassigned, particularly to the Department of Administration.

The Board of Examiners, called a "multiheaded executive"[101] by one commentator, has been commented on time and time again by Montana governmental study groups. In 1919, the State Efficiency and Trade Commission reported:

> The state board of examiners is composed of the governor, secretary of state, and attorney general. This board has much power and many duties . . . . They must examine all claims against the state except salaries or compensation fixed by law. As these claims amount to twelve or fourteen hundred per month, it is out of the question for the board to personally audit these bills, and this work is delegated to a clerk who has neither the time nor the facilities for ascertaining whether or not the money is being judiciously expended. In order to relieve the state board of examiners of many duties which they are physically unable to perform and leave them more time to attend to the duties of the office to which each has been elected, a constitutional amendment has been submitted to be voted on at the next election. If this amendment carries, the next legislative assembly will then be able to create a state board of administration who will then assume all of the duties now imposed on the state board of examiners, and the business of the state can be handled in a more efficient and business-like way. [The amendment failed.][102]

Twenty-two years later--in 1941--a legislative committee expressed a similar opinion:

> In Montana the pre-audit of claims is cumbersome and is duplicated by different departments.

> Signatures of at least two members of the board of examiners are required by all claims before being presented for payment. This requirement is merely a gesture, since in practice a rubber stamp is used for the purpose in the office of the board of examiners. The board of examiners' procedure is another step through which claims must pass before being presented for payment. It serves no purpose other than slowing up the payment of claims.
>
> One of the specific recommendations of this committee is as follows: We further recommend . . . the appointment by the governor and under his direct supervision a controller to have charge of all fiscal affairs of the state of Montana.[103]

Griffenhagen and Associates recommended in 1942 to the Governor's Committee on Reorganization and Economy that a department of finance (headed by a director of finance appointed by the governor) undertake, among other things, the pre-audit of expenditures then being conducted by the Board of Examiners. This recommendation, not achieved until 1961, was passed on to the 1943 Legislature in the following form:

> The plan of organization should provide for the coordination of all the administrative functions in the financial management of the state's affairs through a single agency under a single executive officer, to permit the integration of financial procedures.[104]

Until the early 1900s, the board was charged with central fiscal control for the state, a powerful and important responsibility. Those statutory functions gradually were removed from the board's jurisdiction, however. In 1951 the office of state controller, a gubernatorial appointee, was established and given authority to oversee the fiscal status of the state. The daily fiscal control was transferred to the controller's office in 1961, following the recommendations of a Legislative Council study.[105] In 1963, following another Council study,[106] a centralized Department of Administration was established to consolidate such functions as budgeting, accounting and purchasing.

In 1970, the Commission on Executive Reorganization found that although the Board of Examiners no longer was the state's fiscal control agency, numerous and varied functions still were delegated by statute to the board--remnants of the time when the board was the major state fiscal agency.[107] The Commission found that the board and its staff still performed a myriad of duties, including procuring insurance on state-owned property, preparing and issuing travel permits to public employees and processing the subsequent claims, auditing and examining travel claims of district judges and prisoners, supervising the long range building program, examining unliquidated claims, approving the selection of most state employees and their respective salaries, maintaining the sound system for the legislature, maintaining a contract for service to veterans and their survivors, holding files of the defunct adjusted compensation division and maintaining a current file on all prisoners in the state prison.[108] The primary duties of the board itself were those related to the state building program and the salaries of state employees; the other duties were handled by staff.

The Commission summarized the operation of the board as follows:

> Board members serve for the term of their executive office--four years--and receive no additional compensation for servicing on the Board.
>
> The Governor is the President of the Board and the Secretary of State is designated Secretary to the Board (Section 82-1102, R.C.M. 1947). The Board selects an executive clerk who is the administrative head of the staff of the Board and performs the functions of secretary for the Board.
>
> The Board is required by law to meet on the third Monday of each month and at the call of the Governor (Section 82-1102, R.C.M. 1947). In practice, the Board meets monthly and, in addition, holds approximately five or six extra meetings during the year. The Board is also required to meet on the first Monday of November preceeding each legislative session to examine unliquidated claims against the state (Section 82-1114, R.C.M. 1947). The Board may adjourn from time to time at this meeting until the work is completed and it is prepared to report to the Legislature.
>
> The Board has no published rules or regulations aside from the provisions of the statutes. The Board itself is a policy making Board. Minor administrative decisions are made by the executive clerk; the Board sets the guidelines for these decisions. These guidelines are not formally published or printed, but are informal directives to the staff of the Board. Some items are acted on directly by the Board, such as building contracts, bonds, and salary changes; however, the Board relies on the administrative staff to review all business and present it to the Board with recommendations in a form which requires overall approval and relatively little detailed analysis. Those items which are of questionable nature or of singular importance are singled out for discussion and determination as to the course of action.[109]

The Commission, which proposed no constitutional changes to implement executive reorganization, recommended that the board continue to carry out those duties assigned by the Constitution--that is, the duty to audit unliquidated claims against the state and to examine all claims against the state, except salaries or compensation of officers fixed by law. The only statutory duty the Commission recommended that the board retain was the planning, financing, administration and construction of state buildings in the long range building program. The Commission recommended that all other statutory duties be assumed by the Department of Adminsitration or repealed.[110] The Commission said:

> The members of the Board--the Governor, Secretary of State, and Attorney General--cannot be expected to spend their time on fuctions which are essentially ministerial; most of the current functions of the Board can be so categorized. A significant exception is the role of the Board concerning the Long Range Building Program. The Board is required to determine whether bonds will be issued, at what amount, and, within the limits of the law, the rate of interest and maturity date. The Board is also responsible for approval of all building contracts, including contracts for the selection of architects and engineers. These functions frequently involve policy-decisions which should be made, or at least reviewed, by the chief elected officials of state government . . . .
>
> [T]he Board has one constitutional duty--to examine unliquidated claims against the state--and the Board has the *power*, undefined in the Constitution, to examine *all* claims against the state, except salaries and compensation of officers fixed by law.[111]

The recommendations of the Commission were adopted in the Executive Reorganization Act and the Board of Examiners was transferred to the Department of Administration for administrative purposes.

Thus, the board, the "multiheaded executive" of 1958, has become a mere shadow of its former self. The fiscal management powers have been transferred to a department responsible to the governor and headed by a single administrator. The Convention may want to consider the propriety of continued constitutional status for this once-powerful board.

Constitutional Powers (Claims Against the State). Under Article VII, Section 20, the Board of Examiners have power "to examine all claims against the state except salaries or compensation of officers fixed by law." Prior to 1961, every claim of all state agencies was processed by the staff of the board; in 1961, this function was transferred to the controller[112]--an action recommended in the 1960 Legislative Council report; The Organization and Administration of State Government.[113] Thus, the Board of Examiners was relieved of its responsibility for examining settled or liquidated claims.[114] In 1963, the Department of Administration was created and the function was incorporated into that Department. The Executive Reorganization Act of 1971 left the function in the Department of Administration.

Although the Montana Supreme Court has examined the power and authority of the Board of Examiners, it never has explicitly defined the scope of the board's authority to "examine all claims against the state." In 1909, the Court distinguished between liquidated and unliquidated claims:

> The provision of the Constitution, supra, cited as justification of the action of the board, has no application to a claim such as one here involved. Nor has Section 226, Revised Codes, which declares, in the form of a statute, the prohibition embodied in the Constitution. Both apply to unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of government having authority to fix them. In this case relator's claim was fixed by the Legislature by appropriation of the amount named in the general appropriation bill. The relator was retained in his position because of this fact. His claim is therefore not an unliquidated claim within the class which must be approved by the board of examiners. The relator is pro hac vice during his employment an officer of the court, and as such his compensation has been fixed by law, not, indeed in the sense that there is a particular statute declaring in terms what his compensation shall be, but by virtue of his continued employment by this court. He is therefore entitled to the amount so fixed.[115]

Prior to the legislative transfer of the examination of claims from the Board of Examiners to the Department of Administration, the attorney general in a letter opinion to the Legislative Council stated:

> It is, therefore, apparent from these rulings of our Supreme Court that the duty to examine unliquidated claims is placed in the State Board of Examiners by our Constitution and may not be changed by statute. The duty to examine liquidated claims is now placed in the State Board of Examiners by statute. Since these statutes are always subject

> to change by the legislature, this duty could be placed by a proper statutory enactment, in some other department [emphasis added].

While the precise scope of the board's constitutional powers has never been defined by the Court, in practice the board now examines only unliquidated claims. It would appear, however, that the board has the constitutional authority to examine any claim at its discretion.

Prior to 1969, the Department of Administration was required to pre-audit all claims although it did not have staff and financial resources to actually conduct such a pre-audit. The 1969 Legislature provided that the accounting division of the department "may" conduct a pre-audit of all claims,[116] but that it no longer was mandatory to pre-audit all claims. It is presently the policy of the accounting division to pre-audit on a 10 percent spot-check basis. Thus, primary responsibility for the preparation of claims, expenditure of state funds and pre-audit of claims lies with the agency head authorized to sign the claim form. The Board of Examiners still has its undefined constitutional power to "examine all claims against the state," but in practice it is not used.

As noted previously, the situation for unliquidated claims is different. An unliquidated claim is an unsettled or unassessed claim or one that is not ascertained as to the amount. The Montana Constitution [Art. VII, Sec. 20] provides in part:

> [N]o claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board [of examiners].

The process for consideration of unliquidated claims is established by law. The Commission on Executive Reorganization summarized the process:

> The Board meets on the first Monday of November preceding each legislative session for the purpose of examining unliquidated claims (Section 82-1114, R.C.M. 1947). The number of claims varies a great deal each biennium. There may be as few as 3 claims submitted or as many as 20 or 30. The executive clerk of the Board has indicated that the usual number submitted and acted upon is six or seven per year. The staff reviews claims that are submitted and holds them for presentation to the Board at the specified meeting. The Board must publish a notice

> in the local newspaper of all claims submitted to it and indicate the order in which it will proceed to examine the claims (Section 82-1114, R.C.M. 1947). The Board then must meet to examine the claims. It may hear evidence pro and con, determine the validity of the claim and make recommendations to the Legislature. The procedure is much the same as that of a civil action, except that the deciding authority is the Legislature rather than a civil court.[117]

The executive reorganization office noted that the board's power to examine unliquidated claims against the state is a statutory-type duty "which we believe should be assigned by the Legislature to the Department of Administration."[118]

Constitutional Powers (Suspension of the State Treasurer). The Montana Constitution [Art. VII, Sec. 20] provides in part:

> The legislative assembly may provide for the temporary suspension of the state treasurer by the governor, when the board of examiners deem such action necessary for the protection of the moneys of the state.

The legislature has provided the procedure for the suspension of the treasurer in Sections 79-811 and 79-812, Revised Codes of Montana, 1947. Section 79-811 states:

> The state board of examiners, if, upon examination, find that the books of the state treasurer do not correspond with the amount of funds on hand, or do not show the actual condition of the funds, or if it appears to said board that any moneys belonging to the state have been embezzled, diverted, or in any manner taken from the treasury, without authority of law, or that the state treasurer has been guilty of negligence in keeping his books, or of taking care of the public moneys, must certify the fact to the governor, who upon receipt of such certificate, must forthwith take possession of all books, moneys, papers, and other property belonging to the state which have come into the possession of such state treasurer, by virtue of his office or otherwise, and must temporarily suspend him from his office of state treasurer.

Section 79-812 provides that the Board of Examiners then must procure the services of an expert who shall examine everything to do with the treasurer's office; if it is concluded by the board that any of the above-mentioned charges are true, the suspended treasurer is replaced by a gubernatorial appointee.

All actions taken under these provisions of law must be reported to the legislature, and the treasurer appointed by the governor holds office until the suspended treasurer is restored or his successor elected and qualified. The executive clerk of the Board of Examiners has indicated that to the best of his knowledge the board never has taken action to suspend a state treasurer.[119]

The implementing legislation suggests that this power of the Board of Examiners is also statutory in nature and could be provided for by the legislature without constitutional authorization. Because the Board of Examiners does not normally "examine" the books of the treasurer, the original discovery of discrepancies would be made by the legislative auditor or state examiner. The constitution could be silent on the issue, or could provide for the suspension of the treasurer as provided by law.

Constitutional Powers (Conclusion). The constitutional duties of the Board of Examiners--the power to examine unliquidated claims against the state; the undefined power to examine all claims against the state, and the power to suspend the state treasurer--all could be provided by statute instead of constitutional provision. The power to examine all claims is not exercised, and the power to process unliquidated claims is provided for by statute.

The major important power now vested in the board--the planning, financing, administration and construction of state buildings--[120] is established by statute. While the long-range building program is administered by the Department of Administration, the major policy decisions are made (or at least reviewed) by the board. Absence of a constitutional provision for the Board of Examiners would not prevent the legislature from vesting such power in the chief elected officials of the state, if that were desired.

Board of State Prison Commissioners

Article VII, Section 20 of the Montana Constitution provides, in part:

> The governor, secretary of state and attorney general shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prisons as may be prescribed by law.

The Board of State Prison Commissioners is now obsolete. All its duties have been transferred by law to the Department of Institutions. The executive reorganization office, stating there is "no reason for this non-functioning Board to appear in the Constitution,"[121] has recommended that Article VII, Section 20 be repealed.[122]

Until 1955, legislation defined the board's supervisory control over the prison, its administration and its inmates.[123] Between 1955 and 1965, those functions were shifted to other departments, boards and agencies within the executive branch, culminating in creation of the Department of Institutions, which was to

> utilize at maximum efficiency the resources of state government in a co-ordinated effort . . . and apply the principles of modern institutional administration to the institutions of the state.[124]

This legislative "shifting of powers" left the prison board functionally defunct. Under Revised Codes of Montana, 1947, Section 80-1403, the state prison was one of nine state institutions put under the control of the Department of Institutions for administration "not inconsistent with law."[125]

The Executive Reorganization Act attached the non-functioning Board of State Prison Commissioners to the Department of Administration for administrative purposes only;[126] the powers of the Department of Institutions over the prison were not changed by the Reorganization Act. The constitutional status of the board did not prohibit the assignment of responsibility for administration of the prison; however, it does prohibit the abolition in name of the board by any means other than constitutional amendment. The legislature, by allocation of functions, has removed all duties from the board, and consequently, it now exists in name only.

A proposed amendment which would have deleted the constitutional reference to the Board of State Prison Commissioners was defeated in 1920 by a vote of 51,072 for and 72,870 against.[127] A second amendment approved by the legislature in 1959 which would have accomplished the same purpose did not appear on the ballot because it was not presented to the governor for his signature.[128]

Seventeen states besides Montana constitutionally create a commission analogous to the Board of State Prison Commissioners. However, the composition, powers and duties of those boards vary from state to state.[129]

State Board of Land Commissioners

The State Board of Land Commissioners is created by the Montana Constitution in Article XI, Section 4:

> The governor, superintendent of public instruction, secretary of state and attorney general shall constitute the state board of land commissioners, which shall have the direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law.

The State Board of Land Commissioners is the head of the Department of State Lands,[130] which manages the lands granted to the state by the federal government. The functions of the department include development of state land to increase its value; leasing of state land for grazing, agricultural and mineral uses, and sale of state land and minerals when advisable.

The principal duty of the board is to control the leasing and sale of lands granted to the state. Control is exercised principally through the Department of State Lands. Day-to-day administration of the department is the responsibility of the commissioner of state lands, who is appointed by the governor, subject to the confirmation of the senate, and serves at the governor's pleasure.[131] Constitutional provisions regarding the public school lands, other land grants and land grant funds are discussed in Chapter XI of the study on taxation and finance in this series of reports for the Montana Constitutional Convention.

The Department of States Lands was created by the legislature under general constitutional directives for management of state lands. The power and duties of the department, including selection, classification; appraisal and exchange of public lands; leasing of land; sale of land; granting of easements; timber sales, and oil, gas and mineral leases, are codified in Revised Codes of Montana, 1947, Title 81. The department acts as a landlord over Montana's public land received through grants. It leases and manages the land with a view toward the maximum possible dollar return for the schools and institutions and recently has developed a resource development and conservation program designed to increase the value of the lands.[132]

The board and department have custody and control of more than five million acres of land, with 90 percent of the acreage dedicated to the support and maintenance of public schools. The department traditionally valued the land at $10 an acre, which would place its worth at more than $50 million; the actual value is considerably higher.[133] In fiscal 1970, the department had receipts totaling $10,531,014; of this amount, $2,048,199 was added to the permanent fund and $8,482,813 constituted income to be distributed to the various schools and institutions.[134]

The Commission on Executive Reorganization noted:

> The Department, in effect, acts as a landlord. Montana, unlike most other states, has managed to retain most of its original land grants. The principal activity of the Department is to supervise the leasing of state lands (for grazing, agriculture, and mineral uses) and, of course, to collect rentals therefrom.
>
> The Board itself spends a good deal of its time on administrative matters. However, the Board can (and frequently does) overrule Departmental recommendations--depending upon the circumstances of the situation. Matters that are seemingly of a routine, administrative nature oftentimes become major policy questions to be resolved by the Board. Furthermore, the Board is ultimately responsible for making decisions that directly affect major segments of the state's economy, such as setting agricultural rentals and fixing mineral and coal royalties. Thus, the Board does, in fact, formulate policy for the management of the state's lands. The Board also performs a necessary quasi-judicial function--involving contested leases, the issuance of easements, etc. It is expected that the Board's quasi-judicial role will, of necessity, expand in scope in future years as questions arise concerning the "best" use of state lands.
>
> While the Board formulates policy, it has never compiled a set of rules and regulations for the management of state lands. Most of the policy of the Board is contained in the minutes of Board meetings. Attempts have been made in the past to define, codify and publish Board rules and policy, but they were never completed due to a lack of funding and personnel.[135]

The Commission on Executive Reorganization, avoiding proposals for constitutional amendment, recommended that a Department of State Lands be established:

> The Department . . . performs a unique function in Montana state government: it acts as a landlord with custody over more than 5 million acres of land. The primary goal of the Department is to achieve the maximum possible dollar return from the lands for the benefit of the schools and

> institutions. While the Department is engaged in conservation activities--particularly through the resource development and conservation program--,the aim of these activities is to increase the value of the land so as to increase the income therefrom. Conservation benefits, then, are secondary to the principal objective of monetary return. Because of this uniqueness, the Department should remain a single agency of state government.
>
> The Department should also remain under the control and supervision of the Board of Land Commissioners. As elected officials, the Board members are sensitive to public opinion; this is an important consideration because the lands constitute a trust that belongs to all of the citizens of the state. Further, the Board acts as an excellent "buffer" against the capricious use of the trust lands by a single individual. The sheer magnitude of the trust--more than 5 million acres of land, valued at a minimum of $50 million--makes it imperative that control be vested in a multi-member body. Finally, the Board is now called upon to make significant quasi-judicial decisions. And, in years to come, the Board will have to decide upon questions of major import, such as the "best" possible use of the state's lands.
>
> As noted in the preceding summary, the Board has never compiled a set of rules and regulations. The Board should define, codify and publish its rules and policies if it is to function effectively. The lack of printed rules and regulations means that policy is often little more than what Department employees recollect was done in the past . . . .
>
> [The] Office of State Forester should be transferred to the Department of Natural Resources and Conservation. Most of the duties of the Forester are closely allied to the fundamental purpose of that Department. However, the Board of Land Commissioners must retain control over state timberlands as provided in Article XI, Section 4, Montana Constitution.[136]

Prior to executive reorganization, the board supervised the state forester in his duties concerning state timberlands. Executive reorganization transferred supervision of the state forester to the division of forestry in the Department of Natural Resources and Conservation. However, the Executive Reorganization Act does specify that any functions performed by the division of forestry relating to trust lands are under the direction and control of the State Board of Land Commissioners.[137]

Prior to Executive reorganization, the board was responsible for the investment of all state funds. This investment power was statutory in origin and the Executive Reorganization Act transferred it to the Board of Investments, which has "sole authority to exercise the investment functions . . . . No other agency may invest state funds . . . ."[138]

The investment authority of the State Board of Land Commissioners was statutory in nature; the change in investment procedure and power was accomplished through statutory change. But the Board's responsibilities for the management of land grants is constitutional; any change would require constitutional revision.

It is at least questionable whether the constitution needs to provide for a State Board of Land Commissioners. Such a board could be created by the legislature without constitutional mandate. In fact, the Constitution now provides that the board is to operate "under such regulations and restrictions as may be prescribed by law."

The short ballot question affests the status of all the ex officio boards created in the Constitution, especially the State Board of Land Commissioners because of its importance. If the short ballot approach is adopted by the Convention and the Convention feels it is necessary to provide in the constitution for the management of state lands, such responsibility could be assigned to the State Board of Education. More than 90 percent of the land grant is public school lands; perhaps the State Board of Education would be an appropriate policy-making board for the management of the trust lands because of the relationship between education and the lands. It would appear that the education board could properly serve as a policy-making, quasi-judicial board as does the present ex officio State Board of Land Commissioners.

State Board of Education

Article XI, Section 11 of the Montana Constitution provides:

> The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. The said board shall consist of eleven members, the governor, state superintendent of public instruction, and attorney general, being members ex-officio; the other eight members thereof shall be appointed by the governor; subject to the confirmation

> of the senate, under the regulations and restrictions to be provided by law.

The Montana Supreme Court has ruled that the Constitution vests in the education board "general control over and supervision of all state educational matters, including district and high schools."[139] Numerous statutory powers and duties are listed in Revised Codes of Montana, 1947, Title 75, Chapter 56.

The legislature has provided that the eight appointed members of the board must be equally divided among the congressional districts of the state and that no more than four of them can be from the same political party. They are appointed to eight-year terms, and except in the case of an unexpected vacancy, not more than one member is appointed in any one year.[140]

The State Board of Education acts as a policy-making body in accordance with the powers and duties designated by the legislature, and is authorized to develop the rules and regulations needed to carry out the educational programs established by the legislature. While it exercises certain responsibilities in public education, most of its time and attention is devoted to higher education.

The board is one of two constitutionally created bodies for supervision of education in Montana. The other office, the superintendent of public instruction, is created in Article VII, Section 1 and assigned "such duties as are prescribed in this constitution and by the laws of the state."

The only constitutional duties of the superintendent are ex officio membership on the State Board of Land Commissioners [Art. XI, Sec. 4] and the State Board of Education [Art.XI, Sec. II]. The statutory duties are mainly contained in Revised Codes of Montana, 1947, Title 75, Chapter 57.

The superintendent performs duties in compliance with State Board of Education policies and otherwise is expected to conform to board rules and regulations. Yet the superintendent also is an elected official, directly responsible to the people. Thus, the relationship of the board to the superintendent is not entirely clear. The Constitution is silent on the subject, and the legislature has failed to clarify the division of responsibility for supervision of public education between the board and the superintendent. As construed by the Montana Supreme Court, the State Board of Education under the Constitution "has general control of the supervision of all state educational matters, including district and high schools."[141] The Court also has said that the superintendent--who serves as secretary and ex officio member of the board and executive officer of vocational education--"[by] statute . . . has supervision of all public schools of the state, subject to general supervision of the state board [of education]."[142]

The Commission on Executive Reorganization found that:

> In actual practice the State Board of Education exercises supervision over some educational programs and in other cases gives routine approval to actions or recommendations of the Superintendent of Public Instruction.[143]

The Commission found that the board devotes most of its time to the university system. The board, the Commission said, generally leaves most public school matters to the discretion of the superintendent of public instruction. To quote the Commission,

> [T]he lines of authority and control [Superintendent of Public Instruction vs. State Board of Education] in regard to elementary and secondary schools are presently very unclear.[144]

The Commission, which refrained from recommending constitutional changes, noted;

> Because there are two constitutional agencies involved in education, the opportunity for change by statutory means is limited. However, it is believed that, the two constitutional agencies notwithstanding, efforts should be made to clarify and centralize the educational functions of the state in a single department.[145]

In accordance with Court interpretation of the relationship between the superintendent and the State Board of Education, the Commission on Executive Reorganization proposed that the State Board of Education be made the head of the Department of Education. The Commission noted:

> The department must have one head if it is to function properly. The State Board of Education has constitutional powers over education in the state. The Superintendent of Public Instruction, while being a constitutionally elected official, has only statutory powers over education in the state.[146]

The Commission concluded that the Executive Reorganization Act should vest control over the Department of Education in the State Board of Education, and the superintendent should be responsible, under the board's supervision, for all matters relating to the public schools of the state. The Executive Reorganization Act, as prepared by the Commission and introduced in the legislature, followed that division of authority; however, it was amended prior to passage, deleting the provision which placed the superintendent of public instruction within the Department of Education and subject to the general supervision of the State Board of Education. That provision, which would have clarified the relationship between the two agencies, was deleted to meet objections that the twenty department amendment [Art. VII, Sec. 21] exempted the superintendent and other elected constitutional officials from executive reorganization.

The Executive Reorganization Act, as finally adopted, makes no reference to the relationship between the board and the superintendent. It is unclear if the superintendent and her staff are included in the Department of Education created by the Executive Reorganization Act. Because the new department has not been activated, it is not possible to establish what the relationship will be between the superintendent and the new department. If, in fact, the superintendent is not part of the department, Montana will have created a Department of Education that is not responsible for public school education.

The Constitutional Convention may want to review the constitutional and statutory status of the State Board of Education and the superintendent of public instruction to determine whether it is necessary to clarify the role and function of these two major educational offices.

The Convention will have to decide if the board should be constitutionally created, and if so, how it should be structured, how its members should be chosen, what its powers should be. The Convention also may want to consider creating a separate board of regents to deal with the university system. For a detailed discussion of the State Board of Education, the superintendent of public instruction and other Montana education issues, see the study on education in this series of reports for the Montana Constitutional Convention.

State Depository Board

The State Depository Board is created in Article XII, Section 14 of the Montana Constitution, which now provides:

> The governor, state auditor and state treasurer are hereby constituted a state depository board with full power and authority to designate depositories with which all

> funds in the hands of the state treasurer shall be deposited, and at such rate of interest as may be prescribed by law. When money shall have been deposited under direction of said depository board and in accordance with the law, the treasurer shall not be liable for loss on account of any such deposit occurring through damage by the elements or for any other cause or reason occasioned through means other than his own neglect, fraud or dishonorable conduct. The making of profit out of public moneys, or using the same for any purpose not authorized by law, by the state treasurer or by any other public officer, shall be deemed a felony, and shall be punished as provided for by law and part of such punishment shall be disqualification to hold any public office.

The original article provided:

> The making of profit out of public moneys, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law, but part of such punishment shall be disqualification to hold public office.

The section was amended in 1908 to provide for the ex officio State Depository Board.[147] Revised Codes of Montana, 1947, Title 79, Chapter 3 sets forth the statutory duties of the board prior to executive reorganization: in short, the board designated banks where treasury funds were to be deposited and surplus cash invested.

The Executive Reorganization Act incorporated the board within the Department of Administration for administrative purposes only,[148] and transferred the board's investment functions to the newly created Board of Investments.[149]

Constitutionally, statutorily and historically the board's principal function has been to "designate depositories" (banks) for the deposit of state funds. In 1969 there were 136 banks designated as depositories.[150] The board did not exercise a supervisory function over the deposit and investment of state treasury funds. The Commission on Executive Reorganization noted:

> For the past few years, the Depository Board has met only once a year and only for the purpose of authorizing the Treasurer to purchase General Fund warrants with other treasury funds at no interest. This is made necessary because of the annual school distribution for the General Fund.[151]

The legislative audit of the state treasurer in 1969 discovered many weaknesses relating to the deposit of state funds. The auditor found that demand deposits of state funds in most banks appeared to be far in excess of amounts reasonably necessary.[152] The auditor also concluded that deposits to banks had exceeded the collateral required by statute[153] and that the state was losing considerable sums in potential interest income from certificates of deposit which were paying less than the maximum interest rate available.[154]

The transfer of the investment functions of the state treasurer and State Depository Board to the new Board of Investments by the Executive Reorganization Act should provide more professional and regular management of surplus treasury cash. The Act created the Board of Investments and gave it "sole authority" to invest state funds,[155] but the State Depository Board still has "full power and authority to designate depositories with which all funds in the hands of the state treasurer shall be deposited" [Art. XII, Sec. 14].

The Commission on Executive Reorganization questioned the impact that provision might have on the Board of Investment's authority.[156] If it were interpreted to require the State Depository Board to supervise state investments, it would interfere with the professionalization of the investment function through the board. At present, however, the board, for all practical purposes, is defunct. It is an ex officio board of non-financial personnel with other major responsibilities. The constitutional authority to "designate depositories" is a function that could be left to legislative designation, coordinated with other state fiscal administration policies.

The executive reorganization office has recommended that Article XII, Section 14, providing for the State Depository Board, be repealed. The office commented:

> For all practical purposes, this Board is defunct. An informal meeting--often just by telephone--is held perhaps once a year to approve administrative actions of the State Treasurer. The type of provision contained in this section should be statutory, not constitutional. If the Depository Board were to exercise the powers delegated to it by Section 14, Article XII (designate depositories and fixing interest rate) it would seriously complicate the effective and efficient management of the investment program by the Department of Administration.[157]

State Board of Equalization

The State Board of Equalization is created by Article XII, Section 15 of the Montana Constitution as amended:

> The state board of equalization shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate. A majority of the members of the state board of equalization shall constitute a quorum. The term of office of one of the members first appointed shall end on March 1st, 1925, of another first appointed on March 1st, 1927, and of the third first appointed on March 1st, 1929. Each succeeding member shall hold his office for the term of six years, and until his successor shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy shall hold office for the unexpired term in which the vacancy occurs. The qualifications and salaries of the members of the state board of equalization shall be as provided by law, provided, however, that such members shall be so selected that the board will not be composed of more than two persons who are affiliated with the same political party or organization; provided, further, that each member shall devote his entire time to the duties of the office and shall not hold any position of trust or profit, or engage in any occupation or business interfering or inconsistent with his duties as a member of such board, or serve on or under any committee of any political party or organization, or take part, either directly or indirectly, in any political campaign in the interest of any political party or organization or candidate for office. The state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase, or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property, and between individual taxpayers. Said state board of equalization shall also have such other powers, and perform such other duties relating to taxation as may be prescribed by law.

Additional duties are added to the equalization board's responsibilities by at least two other provisions in the Montana Constitution: Article XII, Section 9 provides that the board has the power, as provided by law, to impose a special property tax levy on livestock; Article XII, Section 16 provides that the board shall assess the property of railroads operating in more than one county.

The State Board of Equalization was originally an ex officio board composed of the governor, secretary of state, state treasurer, state auditor and attorney general. In 1922, the section was amended to create the present board.[158] Originally, the board's principal function, as its name suggests, was administration of the property tax at the state level. The board's duties are not confined to property taxes now, however. It is head of the Department of Revenue and responsible for administration of the entire tax program for the state.

The Montana Supreme Court has ruled that the board was not established solely to administer property taxes and that it was within the legislature's power to give administration of other tax programs to the board.[159] The Court said:

> In conferring specific powers upon the board by the provisions of section 15 of Article XII cf the Constitution the people simply have named certain powers which the legislature may not take away; but by naming certain express powers it iwas not intended to prohibit the legislature from adding others.[160]

The State Board of Equalization is an assessing, administrative and quasi-judicial agency. Its powers and duties can be divided into the following categories:

1. Collection of all taxes for state purposes.

2. Supervision of county assessors and county boards of equalization.

3. Assessment of the net proceeds of mines and the inter-county property of utilities.

4. Equalization of the valuation of taxable property among counties, classes of property and taxpayers.

5. Review of specific assessments on its own initiative or by hearing appeals from the findings of county boards of equalization as well as appeals from its own assessment of inter-county property.

Thus, the Legislative Council noted, "the title 'Board of Equalization' is not truly descriptive of the many duties performed by this board."[161] But despite itsbbroad powers, board members still function primarily as property tax administrators; an estimated 75 percent of their time is spent on that function.[162]

The Commission on Executive Reorganization recommended that the collection of revenues be handled by a Department of Revenue with a single administrator at its head. The Commission recommendation also stipulated that the State Board of Equalization's sole responsibility be the administration of the property tax. The Commission, which refrained from recommending constitutional changes, said:

> Essentially, the Department of Revenue would administer the income and corporation license taxes, the motor fuel tax and all other miscellaneous taxes now collected by the State Board of Equalization (the non-constitutional functions of the Board); but would not absorb the Board's property taxation powers or the Board's duties relating to assessment of inter-county properties and livestock levies. The latter are, with one exception, constitutional duties of the Board. The sole exception is the assessment of inter-county properties of utilities other than railroads. Since the Board is required by the Constitution to assess the inter-county property of railroads, it logically follows that it should continue to assess the inter-county property of all utilities.[163]

The Executive Reorganization Act, adopted by the 1971 Legislature, did not follow the recommendations of the Commission. The State Board of Equalization, rather than a single administrator, was named head of the Department of Revenue. A revenue director, appointed by the governor, also was established for the department. The director is the department's chief administrative officer under the direction of the State Board of Equalization; he performs those functions delegated to him by the Board.[164]

The director also prepares revenue estimates for the state and continuously studies fiscal problems and tax structures for state and local governments. These studies are submitted to the governor and legislature at their request.

One of the major criticisms directed at the State Board of Equalization, as it is presently established in the Constitution, is that the board sits as both an administrative agency and a quasi-judicial agency. In effect, the board sits in judgment on its own assessment and equalization decisions. Many states provide for review of such decisions before an agency separate and distinct from the administrative agency that made the original decision. The review is then more likely to be objective.

Review of assessment and equalization decisions is a function properly performed by a multi-member body. However, it is questionable whether the Department of Revenue should be headed by a multi-member board. Indeed, the trend in state government is away from multiheaded tax agencies; thirty-five of the fifty states have provided single administrators for their principal taxing agencies.[165] The Commission on Executive Reorganization noted:

> Most state government functions, including the collection of revenue, can more effectively and efficiently be administered by a single administrator than by a multi-member group.[166]

In 1960, the Montana Legislative Council recommended that all references to the board be deleted from the Constitution.[167] More significantly, members of the State Board of Equalization themselves have stated that their constitutional status is unnecessary.[168] The executive reorganization office commented as follows:

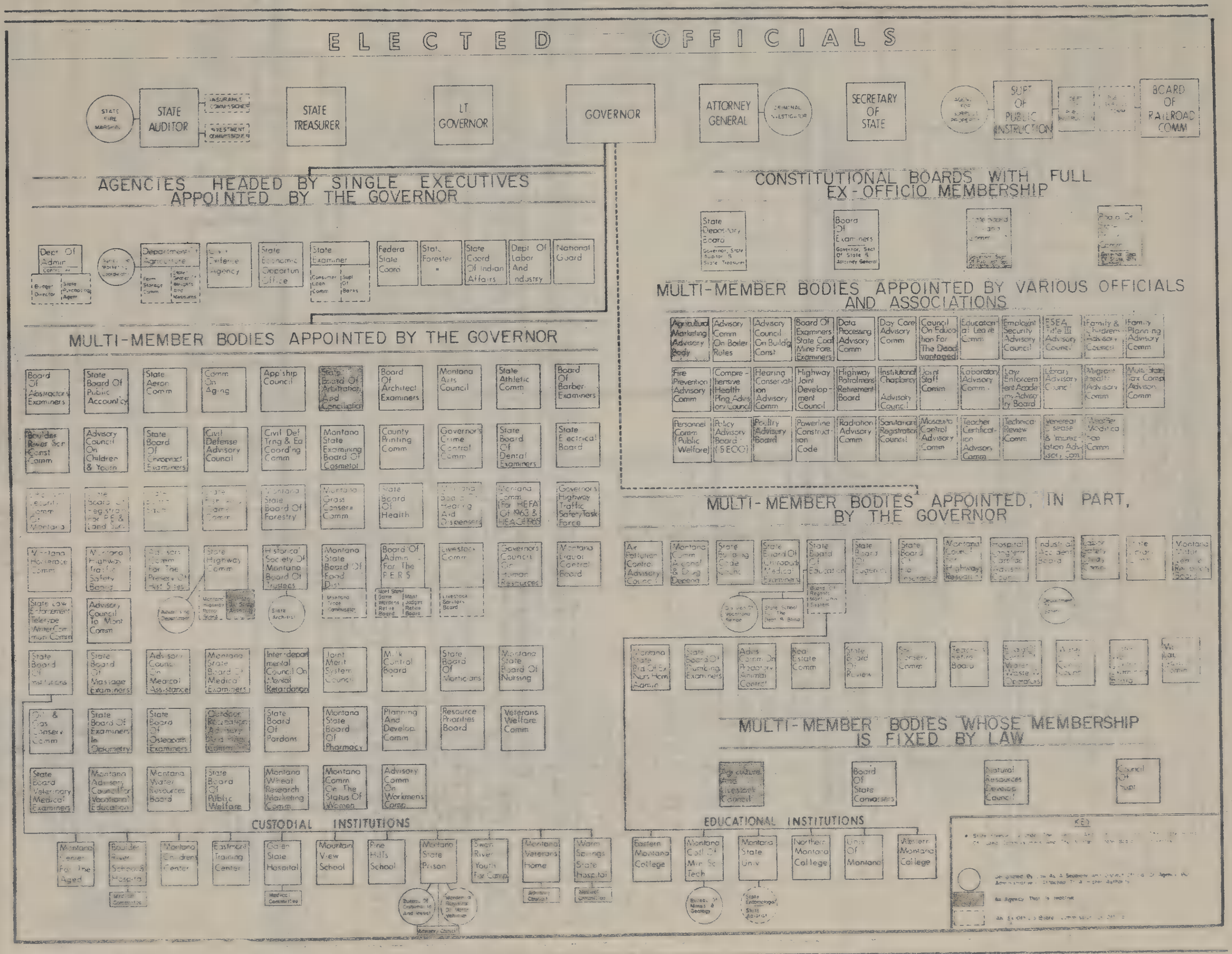
> At present, the overlapping constitutional terms of office of members of the Board of Equalization are not consistent with the central control of the governor. The Executive Reorganization Act makes the Board of Equalization the head of the Department of Revenue. Removal of the Board from the Constitution would allow the Legislature to assign the constitutional duties of The Board to the Department of Revenue proper. The method of tax determination, assessment, and collection should, wherever possible, be left to legislative enactment.[169]

Much of the wording of Article XII, Sections 9, 15, and 16 is statutory in tone and nature. The excessive detail prescribing the functions of the board is to a large degree repeated or expanded in Revised Codes of Montana, 1947, Title 84, Chapter 7. The constitutional status of the board has not prevented numerous statutory changes in both its structure and function. However, the constitutional status has prevented much of the basic reform suggested by the Legislative Council, the Commission on Executive Reorganization and board members themselves.

For a detailed discussion of the board's role in property tax administration, see Chapter III in the study on taxation and finance in this series of reports for the Montana Constitutional Convention.

TABLE 1

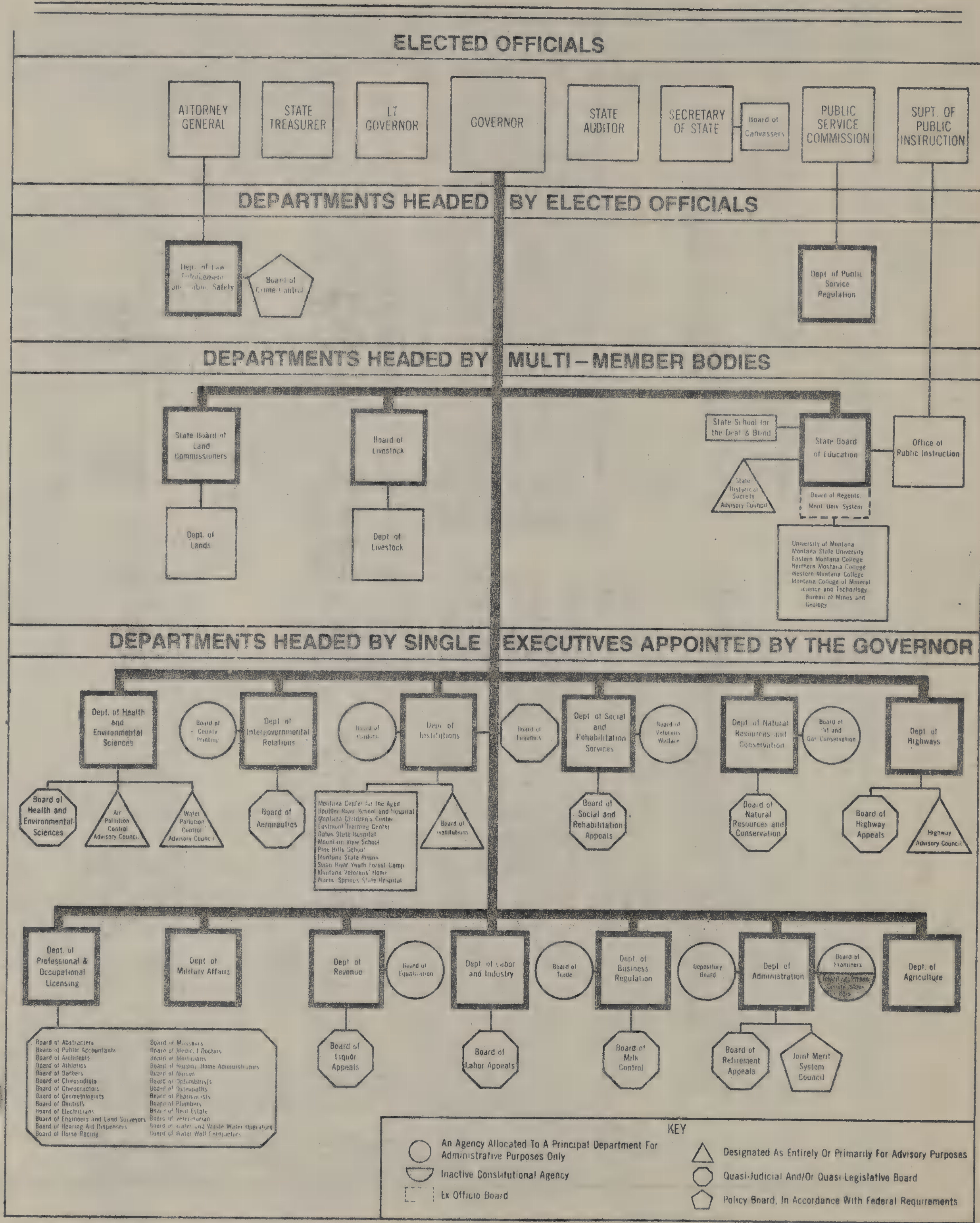
EXECUTIVE BRANCH STRUCTURE PRIOR TO EXECUTIVE REORGANIZATION


ELECTED OFFICIALS
STATE FIRE MARSHAL
STATE AUDITOR
INSURANCE COMMISSIONER
INVESTMENT COMMISSIONER
STATE TREASURER
LT GOVERNOR
GOVERNOR
ATTORNEY GENERAL
CRIMINAL INVESTIGATOR
SECRETARY OF STATE
SUPT OF PUBLIC INSTRUCTION
BOARD OF RAILROAD COMM
AGENCIES HEADED BY SINGLE EXECUTIVES APPOINTED BY THE GOVERNOR
Dept Of Admin
Budget Director
State Purchasing Agent
Department Agriculture
Farm Storage Comm
Dept Seed Weights and Measures
Civil Defense Agency
State Economic Opportun Office
State Examiner
Consumer Loan Comm
Supt Of Banks
Federal State Coord
State Forester
State Coord Of Indian Affairs
Dept Of Labor And Industry
National Guard
MULTI-MEMBER BODIES APPOINTED BY THE GOVERNOR
Board Of Abstractors Examiners
State Board Of Public Accountancy
State Aeron Comm
Comm On Aging
App'ship Council
State Board Of Arbitration And Conciliation
Board Of Architect Examiners
Montana Arts Council
State Athletic Comm
Board Of Barber Examiners
Boulder River Sch Const Comm
Advisory Council On Children & Youth
State Board Of Chiropract Examiners
Civil Defense Advisory Council
Civil Def Trng & Ed Coord'ng Comm
Montana State Examining Board Of Cosmetol
County Printing Comm
Governor's Crime Control Comm
State Board Of Dental Examiners
State Electrical Board
Montana State Board Of Forestry
Montana Grass Conserv Comm
State Board Of Health
Montana Comm For HEFA Of 1963 & HEA Of 1965
Governor's Highway Traffic Safety Task Force
Montana Horserace Comm
Montana Highway Traffic Safety Board
Advisory Comm For The Preserv Of Hist Sites
State Highway Comm
Historical Society Of Montana Board Of Trustees
Montana State Board Of Food Dist
Board Of Admin For The P E R S
Livestock Comm
Governor's Council On Human Resources
Montana Liquor Control Board
State Law Enforcement Teletype Intercom Comm
Advisory Council To Mont Comm
State Architect
Mont State Game Wardens Retire Board
Mont Judges Retire Board
Livestock Sanitary Board
State Board Of Massage Examiners
Advisory Council On Medical Assistance
Montana State Board Of Medical Examiners
Inter-departmental Council On Mental Retardation
Joint Merit System Council
Milk Control Board
State Board Of Morticians
Montana State Board Of Nursing
Oil & Gas Conserv Comm
State Board Of Examiners In Optometry
State Board Of Osteopath Examiners
State Board Of Pardons
Montana State Board Of Pharmacy
Planning And Develop Comm
Resource Priorities Board
Veterans Welfare Comm
State Board Veterinary Medical Examiners
Montana Advisory Council For Vocational Education
Montana Water Resources Board
State Board Of Public Welfare
Montana Wheat Research Marketing Comm
Montana Comm On The Status Of Women
Advisory Comm On Workmen's Comp
CUSTODIAL INSTITUTIONS
Montana Center For The Aged
Boulder River School & Hospital
Medical Committee
Montana Childrens Center
Eastmont Training Center
Galen State Hospital
Medical Committee
Mountain View School
Pine Hills School
Montana State Prison
Swan River Youth For Camp
Montana Veterans Home
Advisory Council
Warm Springs State Hospital
Medical Committee
Advisory Council
CONSTITUTIONAL BOARDS WITH FULL EX-OFFICIO MEMBERSHIP
State Depositary Board
Governor, State Auditor & State Treasurer
Board Of Examiners
Governor, Secy Of State & Attorney General
MULTI-MEMBER BODIES APPOINTED BY VARIOUS OFFICIALS AND ASSOCIATIONS
Agricultural Marketing Advisory Body
Advisory Comm On Boiler Rules
Advisory Council On Build'g Const
Board Of Examiners State Coal Mine Fore. Examiners
Data Processing Advisory Comm
Day Care Advisory Comm
Council On Education For The Disadvantaged
Educational Leave Comm
Employment Security Advisory Council
ESEA Title III Advisory Council
Family & Children Advisory Council
Family Planning Advisory Comm
Fire Prevention Advisory Comm
Comprehensive Health Plng Advisory Council
Hearing Conservation Advisory Comm
Highway Joint Development Council
Highway Patrolmens Retirement Board
Institutional Chaplaincy Advisory Council
Joint Staff Comm
Laboratory Advisory Comm
Law Enforcement Academy Advisory Board
Library Advisory Council
Migrant Health Advisory Comm
Multi-State Tax Comp Advisory Comm
Personnel Comm (Public Welfare)
Policy Advisory Board (SEOO)
Poultry Advisory Board
Powerline Construction Code
Radiation Advisory Comm
Sanitarians Registration Council
Mosquito Control Advisory Comm
Teacher Certification Advisory Comm
Technical Review Comm
Venereal Disease & Immunization Advisory Comm
Weather Modification Comm
MULTI-MEMBER BODIES APPOINTED, IN PART, BY THE GOVERNOR
Air Pollution Control Advisory Council
Montana Comm Alcohol & Drug Depend
State Building Code Council
State Board Of Chiropody Medical Examiners
State Board Of Education
Board Of Regents Mont Univ System
State School For The Deaf & Blind
State Board Of Eugenics
State Board Of Insurance
Montana Council For Highway Research
Hospital Longterm Care Fac Advisory Council
Industrial Accident Board
Montana State Bd Of Ex Nurs Hom Admin
State Board Of Plumbing Examiners
Advis Comm On Predatory Animal Control
Real Estate Comm
State Board Of Review
Soil Conserv Comm
Teachers Retire Board
Water Waste Operators
MULTI-MEMBER BODIES WHOSE MEMBERSHIP IS FIXED BY LAW
Agriculture And Livestock Council
Board Of State Comissioners
Natural Resources Develop Council
Council Of State
EDUCATIONAL INSTITUTIONS
Eastern Montana College
Montana Coll Of Min Sc Tech
Bureau Of Mines & Geology
Montana State Univ
State Entomologist
State Apiarist
Northern Montana College
Univ Of Montana
Western Montana College
KEY
An Agency That Is Inactive

Source: Montana Executive Reorganization Office, Helena, 1971.

TABLE 2

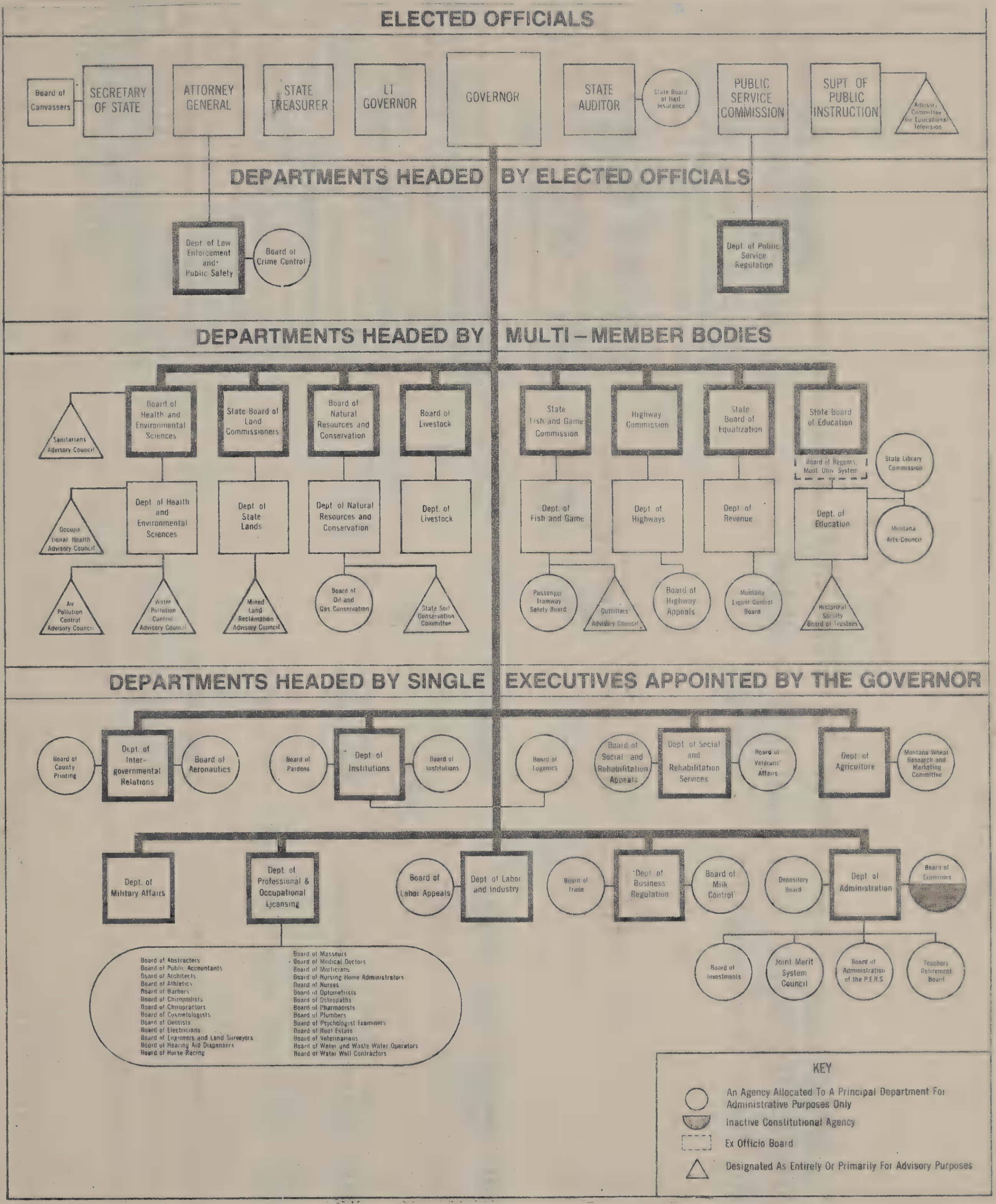
EXECUTIVE BRANCH STRUCTURE PROPOSED BY COMMISSION ON EXECUTIVE REORGANIZATION


ELECTED OFFICIALS
ATTORNEY GENERAL
STATE TREASURER
LT GOVERNOR
GOVERNOR
STATE AUDITOR
SECRETARY OF STATE
Board of Canvassers
PUBLIC SERVICE COMMISSION
SUPT. OF PUBLIC INSTRUCTION
DEPARTMENTS HEADED BY ELECTED OFFICIALS
Dept. of Law Enforcement and Public Safety
Board of Crime Control
Dept. of Public Service Regulation
DEPARTMENTS HEADED BY MULTI-MEMBER BODIES
State Board of Land Commissioners
Dept. of Lands
Board of Livestock
Dept. of Livestock
State School for the Deaf & Blind
State Board of Education
Office of Public Instruction
State Historical Society Advisory Council
Board of Regents, Mont. Univ. System
University of Montana
Montana State University
Eastern Montana College
Northern Montana College
Western Montana College
Montana College of Mineral Science and Technology
Bureau of Mines and Geology
DEPARTMENTS HEADED BY SINGLE EXECUTIVES APPOINTED BY THE GOVERNOR
Dept. of Health and Environmental Sciences
Board of County Printing
Dept. of Intergovernmental Relations
Board of Pardons
Dept. of Institutions
Board of Eugenics
Dept. of Social and Rehabilitation Services
Board of Veterans Welfare
Dept. of Natural Resources and Conservation
Board of Oil and Gas Conservation
Dept. of Highways
Board of Health and Environmental Sciences
Air Pollution Control Advisory Council
Water Pollution Control Advisory Council
Board of Aeronautics
Montana Center for the Aged
Boulder River School and Hospital
Montana Children's Center
Eastmont Training Center
Galen State Hospital
Mountain View School
Pine Hills School
Montana State Prison
Swan River Youth Forest Camp
Montana Veterans' Home
Warm Springs State Hospital
Board of Institutions
Board of Social and Rehabilitation Appeals
Board of Natural Resources and Conservation
Board of Highway Appeals
Highway Advisory Council
Dept. of Professional & Occupational Licensing
Dept. of Military Affairs
Dept. of Revenue
Board of Equalization
Dept. of Labor and Industry
Board of Trade
Dept. of Business Regulation
Depository Board
Dept. of Administration
Board of Examiners
Board of Prison Commissioners
Dept. of Agriculture
Board of Abstracters
Board of Public Accountants
Board of Architects
Board of Athletics
Board of Barbers
Board of Chiropodists
Board of Chiropractors
Board of Cosmetologists
Board of Dentists
Board of Electricians
Board of Engineers and Land Surveyors
Board of Hearing Aid Dispensers
Board of Horse Racing
Board of Masseurs
Board of Medical Doctors
Board of Morticians
Board of Nursing Home Administrators
Board of Nurses
Board of Optometrists
Board of Osteopaths
Board of Pharmacists
Board of Plumbers
Board of Real Estate
Board of Veterinarian
Board of Water and Waste Water Operators
Board of Water Well Contractors
Board of Liquor Appeals
Board of Labor Appeals
Board of Milk Control
Board of Retirement Appeals
Joint Merit System Council
KEY
An Agency Allocated To A Principal Department For Administrative Purposes Only
Inactive Constitutional Agency
Ex Officio Board
Designated As Entirely Or Primarily For Advisory Purposes
Quasi-Judicial And/Or Quasi-Legislative Board
Policy Board, In Accordance With Federal Requirements

Source: Montana Executive Reorganization Office, Helena, 1971.

TABLE 3

EXECUTIVE BRANCH STRUCTURE ADOPTED BY 1971 LEGISLATURE


ELECTED OFFICIALS
Board of Canvassers
SECRETARY OF STATE
ATTORNEY GENERAL
STATE TREASURER
LT GOVERNOR
GOVERNOR
STATE AUDITOR
State Board of Hail Insurance
PUBLIC SERVICE COMMISSION
SUPT. OF PUBLIC INSTRUCTION
Advisory Committee for Educational Television
DEPARTMENTS HEADED BY ELECTED OFFICIALS
Dept. of Law Enforcement and Public Safety
Board of Crime Control
Dept. of Public Service Regulation
DEPARTMENTS HEADED BY MULTI-MEMBER BODIES
Sanitarians Advisory Council
Board of Health and Environmental Sciences
State Board of Land Commissioners
Board of Natural Resources and Conservation
Board of Livestock
State Fish and Game Commission
Highway Commission
State Board of Equalization
State Board of Education
Board of Regents, Mont. Univ. System
State Library Commission
Occupational Health Advisory Council
Dept. of Health and Environmental Sciences
Dept. of State Lands
Dept. of Natural Resources and Conservation
Dept. of Livestock
Dept. of Fish and Game
Dept. of Highways
Dept. of Revenue
Dept. of Education
Montana Arts Council
Air Pollution Control Advisory Council
Water Pollution Control Advisory Council
Mined Land Reclamation Advisory Council
Board of Oil and Gas Conservation
State Soil Conservation Committee
Passenger Tramway Safety Board
Outfitters' Advisory Council
Board of Highway Appeals
Montana Liquor Control Board
Historical Society Board of Trustees
DEPARTMENTS HEADED BY SINGLE EXECUTIVES APPOINTED BY THE GOVERNOR
Board of County Printing
Dept. of Inter-governmental Relations
Board of Aeronautics
Board of Pardons
Dept. of Institutions
Board of Institutions
Board of Eugenics
Board of Social and Rehabilitation Appeals
Dept. of Social and Rehabilitation Services
Board of Veterans' Affairs
Dept. of Agriculture
Montana Wheat Research and Marketing Committee
Dept. of Military Affairs
Dept. of Professional & Occupational Licensing
Board of Labor Appeals
Dept. of Labor and Industry
Board of Trade
Dept. of Business Regulation
Board of Milk Control
Depository Board
Dept. of Administration
Board of Examiners
Board of Abstracters
Board of Public Accountants
Board of Architects
Board of Athletics
Board of Barbers
Board of Chiropodists
Board of Chiropractors
Board of Cosmetologists
Board of Dentists
Board of Electricians
Board of Engineers and Land Surveyors
Board of Hearing Aid Dispensers
Board of Horse Racing
Board of Masseurs
Board of Medical Doctors
Board of Morticians
Board of Nursing Home Administrators
Board of Nurses
Board of Optometrists
Board of Osteopaths
Board of Pharmacists
Board of Plumbers
Board of Psychologist Examiners
Board of Real Estate
Board of Veterinarians
Board of Water and Waste Water Operators
Board of Water Well Contractors
Board of Investments
Joint Merit System Council
Board of Administration of the P.E.R.S.
Teachers Retirement Board
KEY
An Agency Allocated To A Principal Department For Administrative Purposes Only
Inactive Constitutional Agency
Ex Officio Board
Designated As Entirely Or Primarily For Advisory Purposes

Source: Montana Executive Reorganization Office, Helena, 1971.

TABLE 4

AGENCY INDEX

CONSTITUTIONAL DEPARTMENT/AGENCY	FORMER LOCATION	PRESENT LOCATION UNDER EXECUTIVE REORGANIZATION
Department of Agriculture	Separate	Old department abolished, functions transferred to new Department; weights and measures duties transferred to Department of Business Regulation, dairy and egg duties transferred to Department of Livestock; some internal reorganization.
State Depository Board	Separate	Transferred to Department of Administration, retaining all functions except investment functions which transferred to Board of Investments.
State Board of Education	Separate	Transferred to and made head of Department of Education.
State Board of Equalization	Separate	Transferred to and made head of Department of Revenue.
State Examiner	Separate	Transferred to and made head of Department of Business Regulation; some political subdivision functions transferred to Department of Intergovernmental Relations.
Board of Examiners	Separate	Transferred to Department of Administration to perform limited functions only.

TABLE 4 (Continued)

AGENCY INDEX

CONSTITUTIONAL DEPARTMENT/AGENCY	FORMER LOCATION	PRESENT LOCATION UNDER EXECUTIVE REORGANIZATION
Department of Labor and Industry	Separate	Functions transferred to new Department of Labor and Industry.
State Board of Land Commissioners	Separate	Made head of Department of State Lands.
Board of Pardons	Separate	Transferred to Department of Institutions.
State Board of Prison Commissioners	Separate	Transferred to Department of Institutions (nonfunctioning agency).

NOTES

1. The section of this chapter on Executive Reorganization was prepared by James T. Grady, research analyst on the Montana Constitutional Convention staff.

2. Bennett M. Rich, Salient Issues of Constitutional Revision, ed. John P. Wheeler, Jr. (New York: National Municipal League, 1961), p. 106. Cited hereafter as Rich, Salient Issues.

3. Albert L. Sturm, "Trends in State Constitution Making, 1966-1970," William and Mary Law Review 13 (1971): 26.

4. Montana, Legislative Council, The Organization and Administration of State Government, Report No. 3 (Helena, 1960), pp. 13, 14. Cited hereafter as Montana Legislative Council, Organization and Administration.

5. Montana, Commission on Executive Reorganization, Executive Reorganization, A Report to the Montana Legislative Assembly (Helena, 1970), p.2. Cited hereafter as Montana Commission, Executive Reorganization.

6. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, The Constitutions of the Northwest States, Montana Constitutional Convention Memorandum No. 6 (Helena, 1971). In addition to Hicks' study, see the study of constitutional growth in Sister M. Barbara McCarthy, "The Widening Scope of American Constitutions," Doctoral dissertation (Washington, D. C.: Catholic University of America, 1928), especially pp. 48-51 and 108-112.

7. Montana, Legislature, "Report of Joint Committee on State Governmental Organization," House Journal of the Twenty-Seventh Legislative Assembly of the State of Montana (Helena, 1941), p. 339. Cited hereafter as Montana Legislature, "Report on Governmental Organization," Twenty-Seventh Legislative Assembly.

8. Montana Commission, Executive Reorganization, p. 9.

9. Ibid.

10. Ibid., p. 10.

11. Ibid.

12. Ibid., p. 14.

13. Ibid., pp. 14, 15.

14. Ibid., p. 11.

15. Revised Codes of Montana, 1947, Sec. 82A-102.

16. The departmental descriptions were provided by the executive reorganization office.

17. Revised Codes of Montana, 1947, Sec. 82A-115.

18. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Constitutional Provisions Proposed by Constitution Revision Commission Subcommittes, Montana Constitutional Convention Occasional Paper No. 7 (Helena, 1971), pp. 95, 96. Cited hereafter as Montana, Constitution Revision Commission Subcommittees.

19. Hawaii, Legislative Reference Bureau, Article IV: The Executive, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 40. Cited hereafter as Hawaii Reference Bureau, Article IV: The Executive.

20. New York, Temporary State Commission on the Constitutional Convention, State Government, Report No. 14 (New York, 1967), p. 133.

21. Ferrel Heady, State Constitutions: The Structure of Administration (New York: National Municipal League, 1961), p. 16.

22. W. Brooke Graves, Major Problems in State Constitutional Revision (Chicago: Public Administration Service, 1960), p. 195.

23. Dawn Clark Netsch, "The Executive," Con-Con: Issues for the Illinois Constitutional Convention (Urbana: University of Illinois Press, 1970), p. 174.

24. Rich, Salient Issues, p. 111.

25. Hawaii Reference Bureau, Article IV: The Executive, p. 42.

26. Revised Codes of Montana, 1947, Sec. 82A-110.

27. A. E. Buck, The Reorganization of State Governments in the United States (New York: Columbia University Press for National Municipal League, 1938), p. 20.

28. Western Governors' Conference, "Reorganization of State Government" (Council of State Governments, 1958), p. 6. Cited in Hawaii Reference Bureau, Article IV: The Executive.

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29. Council of State Governments, Reorganizing State Government (Chicago, 1950), p. 5.

30. Montana, Legislative Council, Personnel Management, Report No. 12 (Helena, 1964), p. ix.

31. The lieutenant governor is exempted from the requirement of residency in the capital city.

32. Revised Codes of Montana, 1947, Sec. 25-501.

33. Montana Commission, Executive Reorganization, p. 275.

34. Revised Codes of Montana, 1947, Sec. 25-501.

35. Montana, Commission on Executive Reorganization, Commission staff, Report on Law Enforcement and Public Safety, September 18, 1970, p. 1.

36. State ex rel. Ford v. Young, 54 Mont. 401, 170 P. 947 (1918), and State ex rel. Olson v. Public Service Commission, 129 Mont. 107, 283 P. 2d 594 (1955).

37. Revised Codes of Montana, 1947, Sec. 82A-1201.

38. Ibid., Sec. 25-501.

39. See Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Taxation and Finance, Montana Constitutional Convention Study No. 15 (Helena, 1971).

40. Montana, Office of the Legislative Auditor, Office of the State Treasurer, Report on Examination (Helena, 1970), pp. 3,4. Cited hereafter as Montana Legislative Auditor, State Treasurer.

41. Ibid., p. 4.

42. Montana, Legislative Council, Executive Reorganization, Report No. 7 (Helena, 1962), p. 36.

43. Revised Codes of Montana, 1947, Sec. 82A-205.

44. 1971 Laws of Montana, Ch. 156.

45. Ibid., Ch. 216.

46. Montana Legislative Auditor, State Treasurer, pp. 4, 5.

47. Ibid., p. 20.

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48. _Ibid._, p. 21.

49. _Revised Codes of Montana_, 1947, Sec. 25-501.

50. _Ibid._, Sec. 79-101 (10).

51. Montana Const. Art. VII, Sec. 8 and _Revised Codes of Montana_, 1947, Sec. 82-1002.

52. Although it is the legal responsibility of the state examiner to post-audit the state treasurer and clerk of the Supreme Court, in practice the post-audit is performed by the legislative auditor. See Montana, Commission on Executive Reorganization, Commission staff, _Report_ on Business Regulation, November 6, 1970, pp. 1-13. Cited hereafter as Montana Commission staff, Business Regulation.

53. Montana Commission, _Executive Reorganization_, p. 277.

54. _Revised Codes of Montana_, 1947, Sec. 79-101 (4).

55. Montana Commission, _Executive Reorganization_, p. 277.

56. _Revised Codes of Montana_, 1947, Sec. 40-2701.

57. _Ibid._, Sec. 15-2001.

58. _Ibid._, Sec 82A-1202(5).

59. See Montana Commission staff, Business Regulation, pp. 14-31 for a description of the activities of the investment department and the insurance department within the office of the state auditor.

60. _Revised Codes of Montana_, 1947, Sec. 25-501.

61. Contained mainly in _Ibid._, Title 75, Ch. 57.

62. See Montana, Commission on Executive Reorganization, Commission staff, _Report_ on Education, October 30, 1970, pp. 5-29 for a description of the activities of the office of superintendent.

63. Montana Commission, _Executive Reorganization_, p. 105.

64. _Ibid._

65. Montana, 1971 Legislative Assembly, House Bill 3, Section 1, subsection 82A-507, p. 40.

66. The sections of this chapter on Constitutional Departments and Appointed Officials and on Constitutional Boards and Commissions were prepared by Dale A. Harris, executive director of the Montana Constitutional Convention staff.

67. 1923 Laws of Montana Ch. 78; now codified as Revised Codes of Montana, 1947, Title 5, Ch. 6.

68. "The State Examiner is not responsible for the examination or supervision of the 48 national banks, 110 federal credit unions and the 10 federal savings and loan institutions in Montana. These national institutions are examined by the Federal Controller of Currency. Of the 88 state banks which the State Examiner is responsible for examining, 40 are members of the Federal Reserve System. According to the chief of the Banking Division of the state examiner's office, these 40 banks are examined by the Federal Reserve System in cooperation with the State Examiner." [Montana Commission, Executive Reorganization, p. 93.].

69. Montana Commission staff, Business Regulation, pp. 4, 8, 11.

70. Ibid., pp. 1-13.

71. 1967 Laws of Montana, Ch. 249, Sec. 14.

72. Montana Commission, Executive Reorganization, p. 97.

73. Revised Codes of Montana, 1947, Title 82A, Ch. 4.

74. Ibid., Sec. 82A-903.

75. Ibid., Secs. 82A-403 and 82A-903(3).

76. See Montana Commission, Executive Reorganization, p. 97.

77. Letter from John A. Dowdall, State Examiner, Helena, Montana, October 29, 1971, p. 1.

78. Memorandum from Executive Reorganization Office, Helena, Montana, September 9, 1971, p. 2. Cited hereafter as Memorandum, Executive Reorganization office.

79. Ibid.

80. Ibid., Sec. 41-1605.

81. Montana Commission, Executive Reorganization, p. 162. For a discussion of labor functions performed by state

agencies prior to executive reorganization, and the recommendations of the Commission on Executive Reorganization, see Ibid., pp. 162-175 and Montana, Commission on Executive Reorganization, Commission staff, Report on Labor Agencies and Functions, May 1, 1970.

82. Montana Commission, Executive Reorganization, p. 170.

83. Ibid.

84. The other departments headed by a single administrator appointed by the governor are: Department of Intergovernmental Relations, Department of Institutions, Department of Social and Rehabilitation Services, Department of Military Affairs, Department of Professional and Occupational Licensing, Department of Agriculture, Department of Business Regulation and Department of Administration.

85. State ex rel. Nagle v. Stafford, 97 Mont. 275, 34 P.2d 372 (1934).

86. Montana, Legislative Council, The Montana Constitution, Report No. 25 (Helena, 1968), p. 77. Montana, Constitution Revision Commission Subcommittees, p. 188.

87. Memorandum, Executive Reorganization Office, p. 2.

88. See note 86, supra.

89. Revised Codes of Montana, 1947, Title 82A, Ch. 3.

90. For a discussion of the functions of the Department of Agriculture prior to executive reorganization and the recommendations of the Commission on Executive Reorganization for consolidation of agricultural functions, see Montana Commission, Executive Reorganization, pp. 70-89 and Montana, Commission on Executive Reorganization, Commission Staff, Report on Agriculture.

91. Revised Codes of Montana, 1947, Title 94, Ch. 98.

92. In addition to Ibid., Sec. 94-9822, which establishes the Board as authorized in the amended version of Art. VII, Sec. 9 of the Constitution, there is a statute, Revised Codes of Montana, 1947, Sec. 82-903. which established a Board of Pardons with the ex officio membership provided by the Constitution in the article prior to its amendment.

The statute is archaic and conflicts with the statute now in force that establishes the gubernatorially appointed board. The ex officio board does not function. The Commission on Executive Reorganization recommended that Sec. 82-903 be repealed. To date, the section has not been repealed.

93. Montana Commission, Executive Reorganization, p. 143.

94. Ibid., p. 145.

95. Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitutions, 2nd ed. (New York: Oceana Press, 1959), pp. 338, 339.

96. National Municipal League, Model State Constitution, 6th ed., rev. 1968 (New York, 1963, 1968), pp. 69, 70.

97. National Governors' Conference, Study Committee on Constitutional Revision and General Government Organization, Report to National Governors' Conference by the Study Committee on Constitutional Revision and General Government Organization, July 1968, p. 7.

98. Memorandum, Executive Reorganization Office, p. 2.

99. The duties of the Board of Examiners prior to executive reorganization are discussed in Montana, Commission on Executive Reorganization, Commission staff, Supplement No. 2 to Report on Department of Administration, May 14, 1970, pp. 1-27. Cited hereafter as Montana Commission staff, Supplement No. 2, Administration. This summary of the history of the Board of Examiners and remaining constitutional and statutory duties draws heavily from the Commission staff report.

100. Memorandum, Executive Reorganization Office, p. 1.

101. Roland R. Renne, The Government and Administration of Montana (New York: Thomas Y. Crowell Company, 1958), p.96.

102. Montana, State Efficiency and Trade Commission, Report of the State Efficiency and Trade Commission to Governor S.V. Steward (Helena, 1919), p. 7.

103. Montana Legislature, "Report on Governmental Organization," Twenty-Seventh Legislative Assembly, p. 401.

104. Montana, Governor's Committee on Reorganization and

Economy, State of Montana Reorganization Report, (Helena, 1943), p. 93.

105. Montana, Legislative Council, Organization and Administration.

106. Montana, Legislative Council, Executive Reorganization, Report No. 7 (Helena, 1962).

107. Montana Commission staff, Supplement No. 2, Administration, p. 2.

108. Montana Commission, Executive Reorganization, pp. 55, 56.

109. Montana Commission staff, Supplement No. 2, Administration, p. 4.

110. Montana Commission, Executive Reorganization, p. 68.

111. Ibid., p. 65.

112. 1961 Laws of Montana, Ch. 92, Sec. 2. Now codified as Revised Codes of Montana, 1947, Sec. 82-109.2.

113. Montana Legislative Council, Organization and Administration.

114. Revised Codes of Montana, 1947, Sec. 82-1101 was amended to read: "This board is not required to examine settled or liquidated claims for expenditures of any office or department of state government."

115. State ex rel. Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909).

116. 1969 Laws of Montana, Ch. 91, Sec. 1. Codified as Revised Codes of Montana, 1947, Sec. 82-109.2.

117. Montana Commission staff, Supplement No. 2, Administration, p. 12.

118. Memorandum, Executive Reorganization Office, p. 1.

119. Montana Commission staff, Supplement No. 2, Administration, p. 12.

120. The statutory powers and duties of the Board of Examiners relating to the planning, financing, administration and construction of state buildings are discussed in Montana Commission staff, Supplement No. 2, Administration, pp. 9-11.

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121. Memorandum, Executive Reorganization Office, p. 1.

122. Ibid.

123. This legislation, since superceded, is contained in the 1955 version of Revised Codes of Montana, 1947, Title 80, Ch. 7. See especially Secs. 80-718 to 80-721, 80-725 to 80-728, 80-730 to 80-731, 80-735, 80-737, 80-740, 80-749.

124. Revised Codes of Montana, 1947, Sec. 80-1401.

125. Ibid., Sec. 1405(1).

126. Ibid., Secs. 82A-207 and 82A-208.

127. 1919 Laws of Montana, Ch. 25.

128. 1959 Laws of Montana, Ch. 194. The three amendments approved by the legislature in 1959 were invalidated by the Montana Supreme Court in State ex rel. Livingstone v. Murray, 137 Mont. 557, 354 P. 2d 552 (1960) because they had not been signed by the governor.

129. The states are: Arkansas, California, Georgia, Idaho, Nevada, Utah, Nebraska, New Mexico, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Virginia, Washington and Wyoming. Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitutions, 2d ed. (New York: Oceana Press, 1959), pp. 769-770.

130. Revised Codes of Montana, 1947, Title 82A, Ch. 11.

131. The State Board of Land Commissioners and the Department of State Lands are discussed in Montana, Commission on Executive Reorganization, Commission staff, Report on Lands, November 4, 1970 and Montana Commission, Executive Reorganization, pp. 176-180.

132. Revised Codes of Montana, 1947, Title 81, Ch. 24.

133. Montana Commission, Executive Reorganization, p. 177.

134. Ibid.

135. Ibid., p. 178.

136. Ibid., p. 179.

137. Revised Codes of Montana, 1947, Sec. 82A-1505 (2) and (3).

138. *Ibid.*, Sec. 82A-204(4).

139. *State ex rel. School District No. 29 v. Cooney*, 102 Mont. 521, 59 P.2d 48 (1936). Cited hereafter as *State v. Cooney*.

140. *Revised Codes of Montana*, 1947, Sec. 75-5602.

141. *State v. Cooney*, p. 526.

142. *Ibid.*

143. Montana Commission, *Executive Reorganization*, p. 105.

144. *Ibid.*

145. *Ibid.*, p. 106.

146. *Ibid.*

147. 1907 *Laws of Montana*, Ch. 123.

148. *Revised Codes of Montana*, 1947, Sec. 82A-209.

149. *Ibid.*, Sec. 82A-205(1) and (9).

150. Montana Legislative Auditor, *State Treasurer*, p. 39.

151. Montana Commission, *Executive Reorganization*, p. 55.

152. Montana Legislative Auditor, *State Treasurer*, p. 34.

153. *Ibid.*, p. 37.

154. *Ibid.*, p. 39.

155. *Revised Codes of Montana*, 1947, Sec. 82A-204(4).

156. Montana Commission, *Executive Reorganization*, p. 63.

157. Memorandum, Executive Reorganization Office, pp. 1, 2.

158. 1921 *Extraordinary Session Laws of Montana*, Ch. 11.

159. *Butte and Superior Mining Co. v. McIntyre*, 71 Mont. 254, 229 P. 730 (1924).

160. *Ibid.*, p. 259.

161. Montana, Legislative Council, *Property Taxation in Montana*, Report No. 6 (Helena, 1960), p. xvi. Cited hereafter as Montana Legislative Council, *Property Taxation*.

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162. Montana, Commission on Executive Reorganization, Commission staff, Report on the Board of Equalization, pp. 31-32.

163. Montana Commission, Executive Reorganization, p. 258.

164. Revised Codes of Montana, 1947, Title 82A, Ch. 18.

165. Montana Legislative Council, Property Taxation, p. 63.

166. Montana Commission, Executive Reorganization, p. 256.

167. Montana Legislative Council, Property Taxation, p. xvi.

168. Montana, Legislative Council, Property Taxation and the Montana Property Classification Law, Report No. 16 (Helena, 1964), p. 54.

169. Memorandum, Executive Reorganization Office, p. 3.

APPENDIX A

MONTANA CONSTITUTIONAL PROVISIONS ON EXECUTIVE

ARTICLE VII

EXECUTIVE DEPARTMENT

Section 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, attorney general, state treasurer, state auditor and superintendent of public instruction, each of whom shall hold his office for four years, or until his successor is elected and qualified, beginning on the first Monday of January next succeeding his election, except that the terms of office of those who are elected at the first election, shall begin when the state shall be admitted into the Union, and shall end on the first Monday of January, A.D. 1893. The officers of the executive department, excepting the lieutenant-governor, shall during their terms of office reside at the seat of government, where they shall keep the public records, books and papers. They shall perform such duties as are prescribed in this constitution and by the laws of the state. The state treasurer shall not be eligible to his office for the succeeding term.

Section 2. The officers provided for in section 1 of this article, shall be elected by the qualified electors of the state at the time and place of voting for members of the legislative assembly, and the persons respectively, having the highest number of votes for the office voted for shall be elected; but if two or more shall have an equal and the highest number of votes for any one of said offices, the two houses of the legislative assembly, at its next regular session, shall forthwith by joint ballot, elect one of such persons for said office. The returns of election for the officers named in section 1 shall be made in such manner as may be prescribed by law, and all contested elections of the same, other than provided for in this section, shall be determined as may be prescribed by law.

Section 3. No person shall be eligible to the office of governor, lieutenant-governor, or superintendent of public instruction, unless he shall have attained the age of thirty years at the time of his election, nor to the office of secretary of state, state auditor, or state treasurer, unless he shall have attained the age of twenty-five years, nor to the office of attorney general unless he shall have attained the age of thirty years, and have been admitted to practice in the supreme court of the state, or territory of Montana, and be in good standing at the time of his election. In addition to the qualifications above prescribed, each of the officers named shall be a citizen of the United States, and have resided within the state or territory two years next preceding his election.

Section 4. Until otherwise provided by law, the governor, secretary of state, state auditor, treasurer, attorney general and superintendent of public instruction, shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows:

Governor, five thousand dollars per annum;
Secretary of state, three thousand dollars per annum;
Attorney general, three thousand dollars per annum;
State treasurer, three thousand dollars per annum;
State auditor, three thousand dollars per annum;
Superintendent of public instruction, two thousand five hundred dollars per annum.

The lieutenant-governor shall receive the same per diem as may be prescribed by law for the speaker of the legislative assembly, to be allowed only during the sessions of the legislative assembly.

The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section shall receive, for the performance of any official duty, any fee for his own use, but all fees fixed by law for the performance by any officer of any official duty, shall be collected in advance, and deposited with the state treasurer quarterly to the credit of the state. No officer mentioned in this section shall be eligible to, or hold any other public office, except member of the state board of education during his term of office.

Section 5. The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed.

Section 6. The governor shall be commander-in-chief of the militia forces of the state, except when these forces are in the actual service of the United States, and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion.

Section 7. The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If during a recess of the senate a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of secretary of state, state auditor, state treasurer, attorney-general or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified.

Section 8. The legislative assembly shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, and all county treasurers and treasurers of such other public institutions as may be prescribed by law, and shall perform such other duties as the legislative assembly may prescribe. He shall report at least once a year and oftener if required to such officers as may be designated by the legislative assembly. His compensation shall be fixed by law.

Section 9. The governor shall have the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction and judgment for any offenses committed against the criminal laws of the state; Provided, however, That before granting pardons, remitting fines and forfeitures, or commuting punishments, the governor shall be advised concerning the same and that such action has been approved by a board, or a majority thereof, who shall be known as the board of pardons. The legislative assembly shall by law prescribe for the appointment and composition of said board of pardons, its powers and duties; and regulate the proceedings thereof.

Section 10. The governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required;

he may also require information in writing, at any time, under oath, from all officers and managers of state institutions, upon any subject relating to the condition, management and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution. The governor shall at the beginning of each session, and from time to time, by message, give to the legislative assembly information of the condition of the state, and shall recommend such measures as he shall deem expedient. He shall also send to the legislative assembly a statement with vouchers of the expenditures of all moneys belonging to the state and paid out by him. He shall also at the beginning of each session present estimates of the amount of money required to be raised by taxation for all purposes of the state.

Section 11. He may on extraordinary occasions convene the legislative assembly by proclamation, stating the purposes for which it is convened, but when so convened, it shall have no power to legislate on any subjects other than those specified in the proclamation, or which may be recommended by the governor, but may provide for the expenses of the session and other matters incidental thereto. He may also by proclamation convene the senate in extraordinary session for the transaction of executive business.

Section 12. Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members present agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present in that house it shall become a law notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered on the journal. If any bill shall not be returned by the governor within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislative assembly shall by their adjournment prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislative assembly, unless approved by the governor within fifteen days after such adjournment. In case the governor shall fail to approve of any bill after the final adjournment of the legislative assembly it shall be filed, with his objections, in the office of the secretary of state.

Section 13. The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void, unless enacted in the manner following: If the legislative assembly be in session he shall within five days transmit to the house in which the bill originated, a copy of the item or items thereof disapproved, together with his objections thereto, and the items objected to shall be separately reconsidered, and each item shall then take the same course as is prescribed for the passage of bills over the executive veto.

Section 14. In case of the failure to qualify, the impeachment or conviction of felony or infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office, for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant-governor.

Section 15. The lieutenant-governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant-governor, from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant-governor until the vacancy is filled or the disability removed.

Section 16. In case of the failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of felony or infamous crime, or disqualification from any cause, of both the governor and the lieutenant-governor, the duties of the governor shall devolve upon the president pro tempore of the senate until such disqualification of either the governor or lieutenant-governor be removed, or the vacancy filled, and if the president pro tempore of the senate, for any of the above-named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house.

Section 17. The first legislative assembly shall provide a seal for the state, which shall be kept by the secretary of state and used by him officially, and known as the great seal of the state of Montana.

Section 18. All grants and commissions shall be in the name and by the authority of the state of Montana, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

Section 19. An account shall be kept by the officers of the executive department, and of all public institutions of the state of all moneys received by them, severally from all sources, and for every service performed, and of all moneys disbursed by them severally, and a semi-annual report thereof shall be made to the governor, under oath; they shall also, at least twenty days preceding each regular session of the legislative assembly, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislative assembly.

Section 20. The governor, secretary of state and attorney general shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prisons as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board. The legislative assembly may provide for the temporary suspension of the state treasurer by the governor, when the board of examiners deem such action necessary for the protection of the moneys of the state.

Section 21. All executive and administrative offices, boards, bureaus, commissions, agencies and instrumentalities of the executive department of state government and their respective functions, powers, and duties, except for the office of governor, lieutenant governor, secretary of the state, attorney general, state treasurer, state auditor, and superintendent of public instruction, shall be allocated by law among and within not more than twenty (20) departments by no later than July 1, 1973. Subsequently, all new powers or functions shall be assigned to departments, divisions, sections, or units in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department.

APPENDIX B

MODEL ARTICLE OF NATIONAL GOVERNORS' CONFERENCE COMMITTEE*

In preparing the executive article we first reviewed constitutional provisions in some twelve states of varying sizes from Alaska to New York, and including at least one state from every section. A "model" executive article was then prepared, based upon the principles of a strong executive and with administrative authority to operate the executive branch in a manner capable of meeting modern problems. The article leaned heavily on the language and provisions of the *Model State Constitution* of the National Municipal League and on the constitutions of Alaska, Hawaii, Michigan, and New Jersey.

The proposed executive article and six sets of questions dealing with the crucial issues of state constitutional provisions for the executive were sent for critical review and analysis to several professional political scientists who specialize in state government and administration. After all replies were studied and suggestions evaluated, some refinements were made in the draft article. The experts were in essential agreement on nearly all of the main points. The final text of the model executive article follows:

Section 1. *Election.* A general election for Governor and Lieutenant Governor shall be held on the first Tuesday after the first Monday of November, 1970 and quadrennially thereafter. Voting for Governor and Lieutenant Governor shall be as a unit and the candidates for these offices in the unit receiving the greatest number of votes shall be Governor and Lieutenant Governor, respectively.

Section 2. *Qualifications.* The Governor and Lieutenant Governor shall be at least thirty years of age and qualified voters of this state.

Section 3. *Term of Office.* The term of office of the Governor and Lieutenant Governor is four years and shall begin at noon on the second Monday in December following their election.

Section 4. *Succession.* If the Governor-elect dies, resigns, is disqualified, or fails to assume office, the Lieutenant Governor shall become Governor and hold office until the next gubernatorial election. In the event that the office of Lieutenant Governor becomes vacant the Governor shall nominate a Lieutenant Governor who shall take office upon confirmation by a majority of both houses of the legislature. Provision shall be made by law for succession to the office of Governor in the event that neither the Governor nor Lieutenant Governor is able to fulfill the responsibilities of the office. The Supreme Court shall have original and final jurisdiction to determine the absence or disability of the Governor or Governor-elect and to determine the existence of a vacancy in the office of Governor and concerning succession to the office as to its powers and duties.

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*National Governors' Conference, Study Committee on Constitutional Revision and General Government Organization, Report to National Governors' Conference by the Study Committee on Constitutional Revision and General Government Organization (Ironworks Pike, Ky.: Council of State Governments, 1968), pp. 6-8.

Section 5. *Compensation.* The compensation of the Governor and Lieutenant Governor shall be prescribed by law and shall not be increased or diminished during a single term of office.

Section 6. *Executive Authority.* The executive and administrative power of the state shall be vested in the Governor. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power. This authority shall not extend to any action or proceeding against the legislature.

Section 7. *Military Authority.* The Governor shall be commander-in-chief of the armed forces of the state except when they may be called into the service of the United States. He may call out these forces to execute the laws, to preserve order, to suppress or prevent insurrection, or to repel invasion. He shall appoint and commission officers of the armed services.

Section 8. *Clemency.* The Governor shall have the power to grant reprieves, commutations, and pardons, after conviction, and may suspend and remit fines and forfeitures, subject to such procedures as may be prescribed by law.

Section 9. *Messages to Legislature.* The Governor shall, at the beginning of each legislative session, and may at other times, give the legislature information and recommend measures he considers necessary.

Section 10. *Executive Departments.* All executive and administrative offices, agencies and instrumentalities of the executive branch of the state government and their respective functions, powers and duties, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department.

Exclusive of the departments and agencies heretofore prescribed, there is established a Board of Regents for Higher Education, constituted according to law, except that one member shall serve as chairman at the pleasure of the Governor. A chancellor shall be appointed by the Board as its chief administrative officer. All units of higher education, beyond twelfth grade, shall compose a single system subject to the Board of Regents for Higher Education and legislative enactments.

Section 11. *Department Heads.* The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The Governor shall appoint and may remove the heads of all administrative departments. All other officers in the administrative service shall be appointed and may be removed as provided by law. Each principal department shall be under the supervision of the Governor and its head shall serve at the pleasure of the Governor.

Section 12. *Executive Reorganization.* The Governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. Such orders shall be submitted to the legislature, which shall have sixty days of a regular session, or a full session if of shorter duration, to express its disapproval. Unless modified or disapproved by resolution concurred in by a majority of the members of both houses, the orders shall become effective at a date thereafter to be designated by the Governor.

Section 13. *Recess Appointments.* The Governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature.

Section 14. *Budget.* The Governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state.

APPENDIX C

STATE OFFICIALS AND BOARDS PROVIDED FOR IN MONTANA CONSTITUTION*

GOVERNOR

Art.	Sec.
V	1--No veto on initiative or referendums.
V	6--Can call special sessions.
V	16--Chief Justice presides at impeachment of Governor.
V	17--Impeachment liability.
V	30--Approval of contracts of state.
V	40--Approval of every bi-house action.
VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	5--Supreme executive power.
VII	6--Commander-in-chief.
VII	7--Appointment of constitutional officers and others.
VII	8--To appoint examiner.
VII	9--Grant pardons.
VII	10--Information from executive officers.
VII	11--Requisites of calling special session.
VII	12--Veto power.
VII	13--Veto power - money bills.
VII	14--When Lieutenant Governor assumes Governor's office.
VII	16--President pro tem third in line.
VII	18--All commissions and grants signed by Governor.
VII	19--Officers report to Governor.
VII	20--Member Board of Prison Commissioners and Board of Examiners.
VIII	34--Appoints justices, judges and clerk of Supreme Court.
IX	2--Felon may not vote unless pardoned by Governor.
XI	4--Member of State Board of Land Commissioners.
XI	11--Member State Board of Education - appoints 8 members.
XII	13--Treasurer's report to Governor each quarter - publication of report.
XII	14--Member of Depository Board.
XIV	5--If out of state in time of war still commander-in-chief.

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*Compiled as working paper by staff of Montana Commission on Executive Reorganization.

STATE OFFICIALS AND BOARDS PROVIDED FOR IN MONTANA CONSTITUTION

LIEUTENANT GOVERNOR

Art.	Sec.
V	16--Chief Justice presides at impeachment of Lieutenant Governor.
VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	14--Assuming office of Governor.
VII	15--Is president of Senate.

SECRETARY OF STATE

VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	7--Vacancy to be filled by Governor.
VII	12--File any bill not approved by the Governor after final adjournment.
VII	17--Keep the Great Seal of The State of Montana.
VII	18--Countersign all grants and commissions.
VII	20--Member Board of Prison Commissioners and Board of Examiners.
XI	4--Member State Board of Land Commissioners.
XV	8--Railroads must file acceptance of Constitution with Secretary of State.
XIX	9--Publish proposed constitutional amendments.
XXI	4--Keep duplicate record of all gifts, etc. to state permanent school fund.

ATTORNEY GENERAL

IV	Powers only in executive department.
VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	7--Vacancy to be filled by Governor.
VII	10,19--Report to Governor.
VII	19--Keep account of state funds handled.
VII	20--Member Board of Examiners and Board of Prison Commissioners.

Art.	Sec.
XI	4--Member Board of Land Commissioners.
XI	11--Member Board of Education.

TREASURER

VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	7--Vacancy to be filled by Governor.
VII	8--Accounts examined by examiner.
VII	20--Suspension by Governor on advice of examiners.
V	30--Contracts of state subject to Treasurer's approval.
XII	10--Cannot withdraw money except when appropriated.
XII	13--Separate account of each fund - report to Governor.
XII	14--Member Depository Board.
XXI	4--Keeps record of contributions to state.
XXI	9,10--Keeps deposits of money belonging to Montana trust and legacy fund separate from other deposits.

AUDITOR

VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	7--Vacancy to be filled by Governor.
XII	14--Member Depository Board.

SUPERINTENDENT OF PUBLIC INSTRUCTION

VII	1,2,3,4--Duties, election, qualifications and compensation.
VII	7--Vacancy to be filled by Governor.
XI	4--Member State Board of Land Commissioners.
XI	11--Member State Board of Education.

BOARD OF STATE PRISON COMMISSIONERS

VII	20--Governor, Secretary of State and Attorney General. Supervision of all matters connected with the state prison as may be prescribed by law.

STATE OFFICIALS AND BOARDS PROVIDED FOR IN MONTANA CONSTITUTION

BOARD OF EXAMINERS

Art.	Sec.
VII	20--Governor, Secretary of State and Attorney General. Examine all claims against the state; can recommend Legislature suspend State Treasurer.

BOARD OF PARDONS

Art.	Sec.
VII	9--Appointment and composition set by law; advise Governor concerning granting pardons, remitting fines, etc.

STATE EXAMINER

Art.	Sec.
VII	8--Appointed by the Governor, confirmed by the Senate; examines accounts of State Treasurer, supreme court clerks, district court clerks, county treasurers and treasurers of other public institutions as prescribed by law.

STATE BOARD OF EDUCATION

Art.	Sec.
XI	11--Eleven members--Governor, Superintendent of Public Instruction, and Attorney General ex officio, other eight members appointed by the Governor; general control and supervision of state university and various other state educational institutions.

STATE BOARD OF EQUALIZATION

Art.	Sec.
XII	9--May make special levy on livestock.
XII	15--Three members appointed by the Governor with consent of Senate to adjust and equalize valuation of taxable property among the counties, etc.

STATE DEPOSITORY BOARD

Art.	Sec.
XII	14--Governor, Auditor, Treasurer; to designate depositories for state funds.

DEPARTMENT OF AGRICULTURE

XVIII	1--Under control of Commissioner appointed by the Governor.

DEPARTMENT OF LABOR AND INDUSTRY

XVIII	1--Under control of Commissioner appointed by the Governor.

STATE BOARD OF LAND COMMISSIONERS

XI	4--Governor, Superintendent of Public Instruction, Secretary of State and Attorney General; direction, control, leasing and sale of school lands.
XVII	1--Classify public lands.

APPENDIX D

THE OFFICE OF STATE SECRETARY OF STATE: PERSISTING PROBLEMS AND PROPOSALS FOR REFORM*

By James T. Havel

Several provocative issues have been raised in the preceding discussion of the organization and operation of the office of state secretary of state as it currently exists in the United States. In this concluding chapter, some of the more persisting problems relating to state secretariats will be examined in greater detail. Given the great variety in structure and functions among the sundry departments of state, no attempt will be made to posit universally applicable answers for the questions focused upon, although possible alternative approaches to their solution will be suggested. Specific states must necessarily adapt their secretariats to conditions peculiar to their particular settings. They must work out their own individual solutions to whatever problems confront them in conformity with their traditions, needs, and circumstances. To attempt to impose a general formula for the reform of an office of secretary of state in a particular state is to ignore the uniqueness and diversity which characterizes state secretaryships and to stifle proper experimentation with other approaches which may be more suitable to a local situation. As John Stuart Mill said many years ago, "It is desirable . . . that in things which do not primarily concern others, individuality should assert itself."[1] Thus, the proposals for reform which are discussed on the pages to follow are offered as points of departure in the search for viable answers to some of the questions raised, rather than as categorical imperatives demanding acceptance.

Is the Secretary of State a Policy-Maker or an Administrator?

The office of state secretary of state has been traditionally viewed as one essentially concerned with activities which have little or no policy content. As early as 1912, the supreme court of Illinois declared that the duties of a secretary of state were principally clerical in nature.[2] Seven years later, the political scientist Arthur N. Holcombe observed that the secretary of state "is now charged with a great variety of duties, mostly of a perfunctory sort. . . . Unlike the office of attorney-general, this office require little or no exercise of discretionary authority on the part of its incumbent."[3] The following year, the Illinois Legislative Reference Bureau reported that most of the duties of the secretary in the Land of Lincoln were of a ministerial character, employing the language of Professor Holcombe almost verbatim.[4] Everett Kimball, writing in 1922, moderated his remarks somewhat by recognizing differences which may exist in various states. Of the secretary of state, he said, "His duties are chiefly ministerial in character, although in some states he has considerable discretionary power."[5] In the same year, Walter Dodd registered his concurrence with Kimball's analysis, stating, "The office of secretary of state has thus come to have important duties; although many of these duties have no relation to each other, and most of them involve little discretion."[6]

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*Reprinted from James T. Havel, The Office of State Secretary of State in the United States, Governmental Research Series No. 36 (Lawrence: University of Kansas, Governmental Research Center, 1968), pp. 116-151.

This near unanimity of opinion among scholars regarding the clerical and basically ministerial nature of the functions performed by secretaries of state has continued unabated up to the present. The consensus among more modern students of state government has largely supported the conclusions regarding the nature of the secretaryship reached by earlier observers. In 1950, for example, Austin Macdonald concluded his analysis of the state secretary of state by asserting,

> His work involves little or no discretion; he merely complies with constitutional or statutory provisions. It may well be asked, therefore, why the secretary of state should be popularly chosen. The election of policy-determining officers can readily be justified on the ground that they are expressing the will of the people and therefore should be selected in a manner best calculated to secure a direct expression of the popular will. But the secretary of state is not a policy-determining officer, no matter how this phrase may be stretched. His only task is to execute state policy, and for that reason he should be made directly responsible to the state's chief executive—the governor.[7]

Writing at about the same time, Oliver P. Field, Pressly S. Sikes, and John E. Stoner expressed agreement with Macdonald that "the duties of the office . . . (are) mainly of a ministerial character."[8] Other commentators, such as Russell W. Maddox and Robert F. Fuquay, have acknowledged the importance of some of the duties performed by secretaries of state, but have maintained that they are basically "routine in nature."[9] Public office holders and politicians also seem to hold this popular view. In a survey of 200 presidents of state senates, state house speakers, and state party chairmen—including representatives from every state—76.7 percent of the 86 respondents indicated that they did not consider the office of secretary of state an important policy-making agency in their state. Among former and present secretaries of state—whom one might reasonably expect to overemphasize the policy role of the secretary—opinions on this question appear to be almost evenly divided. Out of 77 current and ex-secretaries surveyed who expressed an opinion on the subject, 39 claimed that the office of secretary in their state was significantly involved in the formulation of public policy, while 38 asserted that the post was endowed with almost no discretionary decision-making authority of importance.

Those scholars, public officials, and politicians who describe the duties of secretaries of state as ministerial, administrative, and routine generally maintain that the office of secretary is essentially a depository for public documents. As an office of record, its duties are important, but largely of a housekeeping nature. The secretary's responsibilities, they suggest, are so closely defined by law, that he is allowed almost no leeway to formulate public policy. To them, he is basically a filing officer, performing relatively simple clerical functions, executing directives issued by others—particularly the Governor and state legislature. Even where he is allowed discretionary choices, they are normally so innocuous that they have little effect upon the course of governmental activity or the shape of major state policies. Whatever influence a secretary of state possesses in the councils of state government stems, in this view, from sources other than the prerogatives of his office. To those who denigrate the policy role of the secretary, his position is not normally one of power and authority—command is not his forte. Rather, the secretary administers laws he does not make, pursues goals he does not set, and implements programs he does not devise.

Almost alone among recent political scientists, Charles R. Adrian contends that the prevailing notion of the secretary of state as a powerless official whose emasculated post deserves only scant attention needs revision. Adrian, in analyzing statewide elective offices in addition to those of the Governor and Lieutenant Governor, and including the secretary of state, has said,

> It should not be assumed that these officers, although many of their duties are routine, are not often of considerable influence in policy making. . . . (For example,) the secretary of state may be able to expedite or delay special elections as political considerations dictate.[10]

Defending Adrian's position is a small band of secretaries of state, other public officials, and political practitioners. To them, the office of state secretary of state is frequently an important policy-making agency of state government.

Observers who see policy-making aspects of the secretarial position which seem to have eluded most students of state government usually admit that some secretaryships are devoid of policy significance. In some states, secretaries do possess little or no discretionary authority. But, those who see the secretary as an important policy-making official argue that more evidence about his office is needed than is customarily provided in political science textbooks. To them, most students of state government have given only precursory attention to the office of secretary of state. After a superficial examination of the more visible functions performed by secretaries, most students have concluded that the office generally lacks authority and influence on policy matters. Critics of their position, however, claim that, although it is popular, it is untenable.

To these critics, the distinction between administration and policy-making is an unreal one. They tend to agree with Charles S. Hyneman's observation that,

> The literature (of the profession of political science) supporting the reorganization movement is thick with statements that work of an administrative character should be separated from policy determination and the administrative work entrusted to officials controlled by the chief executive. If such a severance is possible, the dilemma of reconciling "efficiency in operation" with vision and courage in policy determination may be solved. In very few instances, however, does one find in the literature of reorganization either evidence or argument designed to demonstrate that such a severance is practically possible. The proposition is certainly not self-evident; indeed there is a body of experience to suggest that it cannot be accomplished. . . .[11]

According to this position, policy-makers frequently become involved in the administration of the policies they formulate, in the attempt to insure their implementation. Administrators often participate in the determination of policy governing the interstices of the laws and regulations governing their powers and responsibilities. Wherever their duties are vague, they exercise a discretionary decision-making authority which may have policy implications.[12]

Thus, the critics of the prevailing opinion of the secretary of state as a ministerial officer believe that all secretaries of state influence policy matters to some extent. Even those whose duties are outlined in detail in state statutes make policy when they act or refuse to act in certain situations not clearly covered by law. When they interpret their statutory obligations in such areas, their decisions exert a policy-making authority. In addition, the manner in which even clearly defined responsibilities are implemented may have policy implications. The application of law may have fully as much effect on state policy as the language of the law itself. Strict or lax enforcement of licensing qualifications, for example, may alter the original meaning of a law, so that the policy followed may not resemble the policy intended by law-makers. Secretaries of state, like all public officials, may sometimes construe statutes or policy directives to conform to their own predelictions. Whenever they interpret, enforce, or implement policy adopted elsewhere, they inevitably have the opportunity to affect its content.[13]

Even beyond this covert policy influence, however, some observers claim a more direct policy role for state secretaries of state. To them, the secretary, in a number of states, is actively engaged in the formulation of public policy on such matters as elections, corporations and securities regulation, professional licensing, and automobile registration. In states assigning him responsibilities in these areas, he frequently exercises wide discretionary authority to devise programs, promulgate rules and regulations, and enforce standards designed to protect the public health, safety, and welfare.

In the area of elections, for example, those who hold this view assert that the secretary's decisions regarding ballot format may affect the fate of candidates or propositions submitted to the electorate. If the secretary is empowered to set the time of special elections in a state, this, too, can have political significance which may later find reflection in policy outputs. In states where he determines the wording of measures placed on the ballot, the proponents of this position believe that he may be able to influence the election result by employing language with connotations designed to evoke a desired voter response. As supervisor of elections, he sometimes establishes rules and regulations governing the conduct of local election officials and the procedures they are expected to follow. Thus, he may, on occasion, be able to prevent voting abuses or election frauds from occurring. If he is responsible for registration or absentee balloting, he may facilitate or obstruct the exercise of the franchise by servicemen or other potential electors channeled through his office. As a member of a state board of canvassers, he may, if so inclined, participate in altering the outcome of an election by discounting questionable ballots or permitting them to be counted as valid votes. According to those who emphasize the secretary's policy-making role, his intimate involvement with the administration of elections permits him the necessary latitude to make decisions of considerable political and policy import.

The proponents of this position also see in his activities relating to corporations and securities additional evidence of the secretary's policy role. In granting or refusing to grant charters to domestic or foreign corporations, a secretary possessing this authority may help create a climate in his state conducive to business expansion and industrial growth, or he may discourage private enterprise from locating within his jurisdiction. At times, he may exercise subjective judgment in determining whether concerns desiring to register with him meet the qualifications imposed upon them by law. In so doing, say the adherents of this view, he is making policy decisions. By requiring various reports and filings, the secretary can occasionally harass businesses he does not favor. In states in which the secretary regulates stock transfers, conveyances, mergers, and dissolutions of corporations, the restraint or vigor with which he pursues his statutory obligations may have economic repercussions throughout the state. He exercises other controls over corporate businesses in states where he has authority to enforce the corporation code. He may sometimes limit competition with a state by denying charters, refusing to register certain trademarks, or restricting the number of licenses issued to brokers, stock salesmen, insurance agents, and other essential collateral personnel connected with corporate ventures. By regulating securities sales, he can either prevent frauds and other abuses or allow them to exist unnoticed by his office. In other words, from the perspective of persons seeing the office of the secretary as one imbued with important discretionary powers, the secretary of state makes public policy regarding corporations in a number of states. The decisions he makes in this area may promote sound investments, honest business practices, and a healthy business environment or they may help create within a state a haven for monopolies, blue-sky corporations, unscrupulous salesmen, charity rackets, abuses of corporate status, and a climate unreceptive to economic growth.

Professional licensing provides yet another example frequently cited by supporters of the concept of the secretary of state as a policymaker. In states where the secretary supervises or directly engages in the licensing of various occupations, trades, and professions, his authority to issue licenses may be used to insure that only qualified doctors, competent plumbers, or capable persons following other licensed vocations will be allowed to serve the public. The secretary may protect the health and safety of the citizens of his state by denying licenses to the unqualified or the unfit. He may regulate competition within a profession by restricting or relaxing the number of licenses issued. He may, occasionally, seek to raise the standards of a profession by demanding better examination scores or, where he has the authority, by increasing the qualifications necessary to obtain a license. The manner in which he administers licensing laws may have great effect on the livelihood of members of the various occupational groups he licenses. In states in which the secretary is responsible for policing professions, his enforcement of inspection regulations and other rules may prevent fraudulent abuses by malpractitioners of a profession or it may result in the elimination of dangerous practices which violate state health or safety laws. Therefore, say those who contend that the secretary makes policy as well as administers it, professional proficiency, competition, and status may be affected by secretarial decisions. In addition, the policies he adopts may have important consequences for the general public as well as the professions he regulates.

The motor vehicle tasks of the secretaries of state in states like Michigan, Illinois, Minnesota, and Maine are frequently mentioned by those persons critical of the tendency to minimize the policy role of the secretarial position. As they see it, the secretary in these states sets policy whenever he issues a driver's license, negotiates a reciprocal licensing agreement, or enforces traffic safety standards. The guidelines he sometimes establishes for examiners may determine the competency of individuals granted licenses to operate vehicles within his state. In some states he can contribute to the prevention or vigorous prosecution of motor vehicle thefts by the manner in which he performs his registration duties. The manufacture, purchase, and distribution of automobile license plates affords him additional opportunities to make public policy, albeit policy devoid of any great significance. In states in which he licenses used car dealers, he may use his authority to prevent fraud or other abuses in their sales practices. The policy implications of the secretary's motor vehicle duties, according to the view of those persons stressing his decision-making authority, are rather extensive and involve such things as the determination of road use, the quantity and quality of motor vehicle operators, vehicle safety standards, and the degree to which his state will participate in interstate cooperative endeavors in licensing practices and the exchange of information regarding licensees. The decisions he makes, then, can affect the lives of pedestrians and motorists alike.

In addition to the areas already mentioned, the partisans of the position that the secretary of state is a determiner of important public policies point to his responsibilities in some states for letting printing contracts, supervising cemeteries, administering athletic laws, managing public funds, and performing a vast variety of other duties which permit him some discretionary authority. To these partisans, the secretary's involvement in the formulation of governmental programs is much greater than commonly recognized. But nowhere, they suggest, is his influence over public policy more far-reaching or less visible to the casual observer than in the area of his appointive and *ex officio* board responsibilities. In almost every state, the secretary is a member of several boards and commissions concerned with policy judgments relating to penal affairs, educational matters, management of public institutions, claims against the state, conservation, interstate cooperation, fiscal problems, civil defense, personnel administration, and public purchasing. As a member of these boards, the secretary has an equal voice and vote with the other members (frequently including the Governor) in the deliberation and determination of problems coming within their purview. He participates fully in establishing the position of the state with regard to the many undeniably significant issues submitted to these boards for adjudication or resolution. His influence and authority in establishing board policy, of course, is sometimes nullified by an opposing majority; but when he acts in concert with the majority he helps set public goals and establish important programs designed to achieve the ends collectively determined. As a member of the more powerful boards and commissions, the secretary of state can be a policy maker of the highest order, wielding considerable influence in the affairs of state. Unfortunately, say the scholars and governmental officials accentuating this point, these board memberships are frequently so far removed from other secretarial duties that their policy implications are commonly overlooked by students concerned with the office of secretary of state. Since structural charts of state secretaryships normally do not reveal such appointive or *ex officio* positions, their very existence sometimes escapes the attention of the public and scholars interested in state government. The relative invisibility and obscurity of a secretary's board responsibilities may partially account for the lack of emphasis given to the policy role of this official in traditional state government texts, assert those inclined to view the secretary as a major governmental decision-maker.

Other points are sometimes offered in support of the thesis that the secretary of state is more than the ministerial actor he is generally assumed to be by students of public administration. In states in which the secretary is first in the line of succession to the governorship, for example, it is argued that an astute incumbent may be able to exploit the latent authority of his potential elevation to the position of chief executive to increase his prestige and influence among other officeholders. Similarly, a secretary appointed by the Governor or otherwise closely associated with him may be able to employ a psychological transference of authority to parlay his relationship to the head of the executive branch into a gambit for maximizing his influence over state policy. To individuals perceiving the secretary as a policy-maker, the personal stature and forcefulness of an occupant of a secretaryship may also greatly affect the degree to which he actively participates in state goal-setting and the success he realizes for his efforts. Finally, it is contended that the cumulative experience of a secretary enjoying a long tenure in office serves to enhance the influence he wields. In states in which the secretary remains in office through a succession of Governors, he sometimes becomes an instrument for preserving the continuity of public policy. Inexperienced incoming chief executives may consult him on affairs of state, trusting in his judgment and advice and therefore rendering themselves susceptible to his influence on matters of policy. A Governor may come to rely on his secretary's familiarity with state problems and programs and seek his assistance in planning for the future. These somewhat subtle and indirect secretarial influences on policy formation, when taken in conjunction with the more direct involvement of the secretary in governmental policy-making make him, say his admirers, an official of consequence, deserving far more attention than he has yet received.

As is usually the case in most controversies, there appears to be an element of truth in both of the positions outlined above. Certainly, the secretary of state as a policy-maker cannot be classified as an equal of the Governor or even, in most states, as the equal of the attorney general. Many of his duties seem purely ministerial. The maintenance of public records, for example, is hardly a function demanding the exercise of significant discretionary authority. In some states, the secretary makes almost no policy of consequence, although it seems likely that he can, at times, influence policy decisions in every state. Thus, the proponents of the prevailing opinion of the secretary of state's limited policy role rightly assert that his most common duties are basically administrative.

On the other hand, they may be justifiably criticized for unduly demeaning the policy-making potential of the office in the vast area of miscellaneous, and often highly important, duties assigned to secretaries in individual states. The secretary of state, in many states, is a policy-maker of considerable import, just as the minority position avers. Those persons who argue that the secretary does exercise noteworthy influence in the affairs of state also seem to be correct in claiming that the secretaryship has not received sufficient attention from scholars to validate the conclusions about its character which find expression in most state government and public administration texts.

Perhaps part of the difference of opinion regarding the policy role of state secretaries may be resolved by a more precise definition of what is meant by such terms as "public policy," "ministerial or administrative duties," "discretionary authority," and "decision-making." But, semantics aside, it appears likely that the major difficulty arises from the attempt to generalize about an office whose nature so varies from state to state as to defy generic description. The policy roles of secretaries of state should probably be determined individually according to their functions in specific states, rather than collectively in some tenuous generalization.

What is the Appropriate Role of a Secretary of State?

One of the major difficulties in evaluating the office of state secretary of state arises from the uncertainty surrounding the definition of appropriate secretarial functions. What is the proper role of a secretary of state? Should secretaries perform a wide variety of miscellaneous duties or should they be restricted to essentially clerical and record-keeping tasks? Should their responsibilities include service on *ex officio* and statutory boards whose duties are basically unrelated to their main functions? Should they be policy-makers or policy executors, or both?

If it is difficult to determine factually the extent of secretarial involvement in governmental goal setting, it is even more difficult to evaluate normative questions regarding the nature of the secretarial office. Value-oriented queries employing terms such as "should," "proper," and "appropriate" belong in the realm of judgment and not of fact. Subjective judgments are seldom empirically verifiable, and even where the "facts" which form the basis for judgments are incontrovertible, reasonable men may differ as to their interpretation. Thus, the sometimes conflicting opinions regarding the appropriate role of the state secretary of state should be viewed as alternative perspectives, rather than weighed as correct or incorrect propositions.

Although there are undoubtedly variations on the themes, discussion on the "proper" role of the secretary of state seems to be naturally divided into two fundamental positions—here arbitrarily designated as the legitimist and the pragmatist positions. The legitimists tend to accept the narrow, dictionary definition of a secretary as a clerk and record-keeper as the criterion of what a secretary of state should be. Their restrictive conception of appropriate secretarial functions minimizes the sphere of activity in which a secretary should be involved. The pragmatists, on the other hand, take a more favorable attitude toward the growth of secretarial responsibilities beyond the custodial and house-keeping duties which originally constituted the secretary's *raison d'etre.* To them, any governmental duty may be appropriately assigned to a secretary of state if that official can adequately manage the task. The evolution of the secretaryship as a holding company for incipient governmental endeavors poses few problems for the pragmatists. As long as the office is useful for this purpose and the discharge of its miscellaneous functions has proved practical, most pragmatists see little reason for relieving the secretary of state of many of the seemingly irrelevant duties currently assigned to him. This dichotomy of views has several ramifications which deserve further exploration.

According to *Webster's New World Dictionary,* a secretary is one "employed to keep records, handle correspondence, etc. for an organization or individual."[14] The legitimist, in subscribing to this definition, maintains that a secretary of state should be essentially the chief clerk of the government. In his view, a secretary should maintain the official records of a state and provide clerical services for other officials in the executive branch, notably the Governor. He should not act as a court prothonotary, state auditor, or securities commissioner. The secretary should be removed from all policy-making boards and commissions which are not directly related to his recordkeeping or clerical functions. He should not be involved in the licensing of automobiles, businesses, or professions, nor should he, in this view, be charged with chartering corporations or collecting corporate taxes. He should be divested of all important discretionary decision-making authority. To the legitimist, the secretary's duties should be purely ministerial and secretarial, in the strictest construction of those terms possible under prevailing conditions.

Persons of the legitimist persuasion are frequently distressed by the wide assortment of non-clerical and non-custodial functions assigned to secretaries by state legislatures. They generally condemn the use of the office as a "scrap-basket of governmental odds-and-ends." To them, there is no cogent reason why diverse and unrelated functions should be brought together under the administration of a secretary of state. Many legitimists would advocate parceling out some of the less germane secretarial duties to other existing state departments and agencies. They would liquidate many responsibilities currently lodged with state secretaries. In their view, automobile licensing should be transferred to a motor vehicle division or highway department, corporation tasks should be given to a corporation commission, professional licensing should be handled by a department of education or other agencies, and other miscellaneous functions now performed by state secretaries in some states should similarly be redistributed on a more rational basis to other governmental offices and bureaus. The legitimists would agree with Kirk Porter that,

> It is a mistake to scatter activities that ought to be grouped together, and it is also a mistake to consolidate a variety of functions that have little in common. Sound integration implies an array of administrative agencies, each of which is well unified, embracing all the services of intimately related character and none that are wholly extraneous.[15]

They tend to view many current secretarial functions as incongruous and anomalous, echoing Porter's demand that "they should be taken out (of the secretary's office) and put where they belong."[16]

Similarly, the legitimists assert that secretaries should be removed from the plethora of boards on which they now so commonly serve. In their opinion, the secretary's attention should be focused upon his clerical and custodial duties. If a secretary is forced to divide his time between these duties and a myriad of unrelated tasks arising from board responsibilities, his efficiency is decreased and he becomes less likely to perform adequately any of his assigned obligations. To the adherents of this position, he should be freed from his membership on land boards, prison boards, and public commissions, so that he might devote his entire energies to performing what they consider to be his "proper" secretarial duties.

Legitimists would curtail the various non-clerical and non-custodial activities of secretaries of state and confine them to relatively simple and routine tasks. The secretary would be reduced, in essence, to an amanuensis for the state executive. His office would cease to be functionally eclectic—the recipient of duties haphazardly, irrationally, or sometimes even whimsically assigned by state legislatures. Instead, they would restructure the department of state so that its functions would be more closely inter-related. Such a department, exorcised of the spirit of amalgam, would, they contend, follow the classical textbook description of a well-integrated, co-ordinated, and efficient service agency for state administrators.

The pragmatists, on the other hand, usually have no difficulty reconciling themselves with the state secretarial status quo. Whereas the legitimists are primarily scholars and students of state government, the pragmatists are normally government officials, legislators, and politicians who are less concerned with the theory of administrative integration than with the solution to immediate, and often pressing, governmental problems. As such, they tend to view the secretary of state as much more than the chief clerk in state government. The pragmatists justify the continued existence of the office of secretary of state on more than the necessity for maintaining an agency to perform simple and routine paperwork for the state. They claim that some official is needed who can supervise experimental governmental programs which are inaugurated on too small a scale to warrant the creation of a new and separate office specifically charged with their administration. To them, the office of the secretary is both convenient and useful as a caretaker of such nascent state activities. From the pragmatic point of view, his office is as logical a place as any other executive department for the assignment of these new, and often diverse, duties—perhaps more logical, since his rather facile clerical and custodial functions usually make less demands upon his time and energy than their traditional responsibilities normally make upon other executive officers. The pragmatists argue that, historically, the secretary has been relieved of his supervisory obligations for these miscellaneous endeavors whenever they have assumed an importance sufficient to justify their independent status. Consequently, the secretary's involvement with new state programs is normally temporary. He nurtures them in their infancy, but releases them when they reach maturity.

The pragmatists see little problem in the administration of the numerous activities falling within the jurisdiction of secretaries of state. To them, past experience has provided ample evidence of the ability of secretaries to supervise the affairs of their somewhat heterogeneous departments. As they see it, most departments of state are well-organized, smoothly functioning, and efficient. To disrupt the operations of these departments by re-distributing some of their tasks to other agencies in the interests of better administrative integration would likely destroy state department morale and lessen the caliber of service rendered by their personnel. Whether it would improve the quality of program performance under different supervision is, say the pragmatists, too uncertain to merit the risk of needless change. The present use of the office of secretary of state as a so-called "scrap-basket for governmental odds-and-ends," in their opinion, has proved necessary, practical, and convenient. With a properly organized department, a secretary's span of control need be no more overextended than that of a corporation chairman whose duties encompass a wide range of activities. Cautious and conservative, the pragmatists believe that effectiveness and usefulness are more dependable yardsticks for measuring secretarial performance than conformity with untested theoretical models of administrative integration.

In addition to serving as an expedient and suitable instrument for effecting the centralization of variegated public programs, the pragmatists say that the office of secretary of state, properly utilized, may become a training ground for future Governors and other high elected officials. They see no need to remove a secretary from the numerous boards on which he serves or to sterilize his office by eliminating many of the conglomerate aspects which have heretofore characterized it. As they see it, the secretary, through his service on various boards and commissions, is given the opportunity to familiarize himself with many of the problems confronting his state. As a board member, he may participate in the formulation of important public policies, thereby increasing his understanding of the problems and programs comprising significant areas of gubernatorial concern. His experience in managing the manifold duties commonly attached to a department of state may provide him with valuable skills necessary to meet the administrative challenges with which a Governor must frequently contend. Thus, although the office has not normally been used as a successful springboard to political advancement in the past, many pragmatists envision a growing role for it in the recruitment of future gubernatorial candidates; but they suggest that this role will only be realized if the office is not emasculated along the lines advocated by the legitimists. As long as the secretary of state retains his policy-making import and continues to supervise consequential activities, his office is unlikely to become moribund. To the pragmatist, the secretary of state is a useful official who may properly be assigned whatever functions the legislature demands of him and which he can adequately provide. He need not be restricted to duties which are uniformly housekeeping or clerical in nature, nor need he necessarily serve as a subaltern clerk for the state executive.

Despite their disagreement over the merits or shortcomings of the present structure and operation of state departments of state, most legitimists and pragmatists agree that the secretarial office does perform a wealth of unrelated tasks. Adherents of both positions recognize that secretaries of state must commonly divide their time between their duties as secretaries and their responsibilities as members of *ex officio* and statutory boards. They acknowledge the policy-making aspects of the secretarial position in some states—although they may not concur on the significance of the decision-making authority the secretary possesses. But where the two positions differ most markedly is in their assessment of the appropriate role a secretary of state should play in state governmental affairs. The legitimists would like to diminish the secretarial role and relegate this official to the classification of chief scribe and archivist for the state. Conversely, the pragmatists defend the status quo. In fact, some would even increase his stature by granting him additional duties and accentuating the tendency to make his office a holding company for inchoate public programs. It is hardly surprising, then, to find that suggestions for improving the structure and operation of state secretariats commonly reflect the conflicting perspectives of the legitimists and the pragmatists.

Proposals for Reform

The office of state secretary of state has seldom been the focal point for extensive scholarly discussion, but periodically public and private agencies and individuals have examined the post as an element in the state administrative structure. When students of state government, constitutional revision commissions, governmental reorganization committees, and others concerned with public problems have considered the department of state, they have generally advanced suggestions for improving its operation or altering its relation to other departments within the executive branch. While the various reform groups have ardently espoused their particular programs, only rarely have they been in agreement regarding the direction of necessary changes. Proposed changes in the structure and functions of state secretariats are almost as numerous and diverse as the different offices they are intended to improve. Hence, they are only infrequently advocated as generally applicable panaceas. Normally, they are posited as possible remedies for specific deficiencies in particular states. Even so qualified, however, they are worthy of general review, since many reform proposals may merit wider application than they have thus far received.

Perhaps the least controversial, internal procedural changes have commonly been suggested as a means of improving the efficiency of departments of state. Many of these changes have emanated from secretaries of state themselves—men whose positions enable them to see areas of needed reform, some of which can only be accomplished through legislative action. The area of records management, for example, has provided a fertile field for recommended improvements. A frequent complaint among secretaries and their staffs has centered on the lack of adequate equipment and space to handle the mass of documents which are deposited with them for safekeeping. Consequently, reformers have sometimes suggested better provisions for storing and preserving state records and other paper matter entrusted to the secretary of state. They have advocated the use of card indexes and microfilming equipment, greater reliance on electronic data processing for tabulating, sorting, and locating records, and better physical facilities for records maintenance. Individuals interested in this subject tend to favor a modern records management program which includes a trained, professional staff; well-lighted, spacious, climate-controlled storage areas; and the use of accepted archival techniques for filing valuable state papers.

The lack of sufficient space to perform required tasks is not confined to the area of records management. Secretaries of state often mention the need for more space to accommodate their staffs, office machinery, and their frequent visitors. Reception rooms, reference rooms or libraries, and private offices are sometimes viewed as necessary appurtenances to secretariats which seek to provide services and hospitality for legislators, government officials, and the general public. They would, in the opinion of some reformers, be beneficial additions to any secretarial office, for they would enhance the dignity of the secretary's position and expedite the implementation of some of the service-oriented functions of his department, thereby increasing its efficiency. The need for greater workroom, however, is a complaint common to many governmental agencies. In states in which the secretary voices his desire for more office space, his success in achieving his goal will likely depend upon the priority assigned to his request by legislative leaders.

Similarly, the frequent requests made by secretaries of state for increased personnel, larger operating budgets, and higher staff salaries will probably be met by their legislatures on a priority basis. The demands of competing state agencies, political considerations, insufficient public funds, and other factors may impede the fulfillment of a secretary's ambitions for the improvement of conditions within his office. The legislature's perception of the appropriate role and functions of a secretary of state may also affect the expenditure of funds for certain secretarial programs. Finally, the prestige an incumbent secretary may be able to command among legislators and other major decision-makers in the budgetary process can sometimes influence his success in securing desired changes.

In addition to promoting the greater use of computers, increased office space and personnel, and larger secretarial budgets, some advocates of internal procedural and functional reforms have suggested the addition of a full-time attorney to the staff of the department of state to render legal advice on questions arising from the performance of secretarial duties. As an alternative, they propose the designation of a member of the attorney general's staff as special counsel to the department of state. In a number of states, this idea has already been adopted; but in others the secretary must either rely upon his own devices or the limited assistance available in the attorney general's office in determining legal matters coming before him. Fortunately, many secretaries are lawyers or have had legal training, so that the problem has not normally been an acute one. Still, the proponents of this change argue that the secretary should be relieved of the burden of making legal decisions without the benefit of expert advice. Legal assistance should be readily available to him on a permanent basis.

As indicated earlier, some reformers have asserted that the organization of the office of secretary of state in most states is administratively unsound. They have generally contended that the duties frequently assigned to the office are too numerous and too diverse to justify their existence within the jurisdiction of a single department.

Many tasks, they claim, are wholly extraneous and irrelevant to the secretary's main responsibilities, which are essentially clerical and custodial in nature. Similarly, many of his board duties bear little or no relationship to his primary purpose within the structure of government. The tasks of administrative oversight and supervision of the heterogeneous functions and polylithic structure of most departments of state are extremely difficult and burdensome, according to the adherents of this position. Consequently, many of the observers of this persuasion argue that a more rational administrative allotment of functions is desirable. They conclude that the office of secretary of state can be improved by removing the secretary from many of the more alien boards to which he has been arbitrarily assigned. They also seek the elimination or reassignment to other departments of the multifarious and discordant responsibilities currently entrusted to him and the restriction of his policy-making role. Such a reorganization, say its proponents, would be more reasonable than the usual chaotic functional pattern found in most states and it would be a significant contribution toward the achievement of administrative integration in state departments of state.

Arguing from a different perspective, some observers have reached a conclusion opposite from that of persons advocating a reduction in secretarial obligations. To these critics, the office of secretary of state has already been too greatly emasculated by the efforts of some students of public administration. They feel that a number of duties—such as automobile licensing—which have generally been reassigned elsewhere, could well remain within the jurisdiction of a department of state. As a result of functional reassignment, say those who rue this tendency, the office of secretary of state has been stripped of much of its dignity, authority, and usefulness. The remedy, they suggest, is not to exacerbate the situation by continuing this practice, but rather to reverse it by giving the secretary additional duties and restoring to him many of the functions he once performed. By increasing the policy role of the secretary and expanding the functional areas within his jurisdiction, they contend that his office will once again discharge meaningful duties and be elevated to its rightful dignity as a major constitutional office of state government. The best way to improve the secretarial office, according to this view, is to retain and increase the secretary's non-clerical and non-custodial duties and powers, thereby granting him the status worthy of a public official who heads an important department in the state executive branch.

In conjunction with the addition or removal of certain secretarial duties, many observers believe that there should be an accompanying reorganization of departments of state along functional lines. They argue that the responsibilities of many structural subunits and individual positions in some secretariats are too diverse or ill-defined. They charge that inadequate staff services are provided in most departments and that secretaries of state are too commonly involved in routine operational activities. The proponents of this view suggest that the duties of specific units and workers should be more clearly defined and segregated; that separate administrative sections be created within departments to provide auxiliary management services and research; and that the secretary and his immediate lieutenants act as generalists coordinating the activities of lower-level division chiefs, who, in turn, supervise the daily operations of their particular functional units. The advocates of these proposals contend that, if adopted, they would bring the structure of secretariats into closer conformity with the accepted principles and organizational patterns of public administration. It should probably be recognized, however, that the sizes and functions of departments of state vary greatly from state to state, necessitating organizational flexibility and adaptability to meet the requirements of individual states. It appears unlikely that a single structural mold—whatever its merits in the eyes of students of public administration—would be suitable to the needs of every department of state. Diversity in the organization of secretariats is the almost inevitable concomitant of diversity in their tasks and the number of personnel available to perform them.

Aside from internal, procedural changes, the secretary's relationships to the Governor and the structure of state government in general have received a generous share of the attention of individuals proposing reforms which affect his office. The reforms suggested have tended to be highly controversial, since they frequently involve revolutionary proposals of significant consequence to the future of state secretariats. The reception—be it acceptance or rejection—accorded to these various recommendations, most of which have originated in academic circles, will likely determine the office's prospects for continued service or eventual abolition.

In those states without a Lieutenant Governor, one plan being widely discussed as a possible alternative to the separate election of the Governor and his secretary of state is the joint ballot proposal which Alaska adopted when it became a state. Under the Alaskan method of selecting the Governor and secretary of state, a single ballot is cast for the two offices, i.e., a vote cast for the candidate for Governor is considered as cast also for the candidate for secretary of state running jointly with him. In this way, the person elected Governor will always have a secretary of state in his administration who shares his party affiliation and, presumably, the two will normally be able to work together harmoniously as a team. The proponents of this plan see it as a means of strengthening the Governor's control over his administration and eliminating a potential source of friction between two coordinate officials. To them, the scheme has the added advantage—in states in which the secretary is first in the line of succession to the governorship—of permitting the party with a popular gubernatorial majority to retain the Governor's office whenever the incumbent dies, resigns, or is incapacitated. A change in Governor at mid-term would then be less likely to result in an abrupt reversal of policies or a mass exodus of personnel. This plan has been successfully applied to joint Governor-Lieutenant Governor ballots in Michigan and Hawaii (where the Lieutenant Governor acts as secretary of state).

A popular reform proposal in those 13 states in which the secretary serves a two-year term is to increase the length of his term to four years. According to the advocates of this change, a four-year term for elective secretaries would decrease the costs of campaigning, promote greater efficiency in office by eliminating biennial interruptions for electioneering, and allow the incumbent to familiarize himself with the operations of his office and establish a record of performance before submitting his future to popular determination. Those favorable to longer secretarial terms argue that it is little short of ludicrous to elect a Governor for four years and then—as is now the practice in Indiana and Maine—elect those execute officials with whom he must work every two years. Such an arrangement heightens the possibility that, for at least a part of the gubernatorial term, the Governor and his secretary of state will be members of different political parties. If this situation arises, administrative efficiency may occasionally be decreased by partisan conflict and non-cooperation between the two officials.[17] Another merit of an expanded term of office for the secretary, according to its proponents, is that it will permit long-range planning and promote stability and continuity in office. Secretaries in office for four years would probably have a better chance to be re-elected, since they would have more time to establish a reputation and a solid base of political support. In addition, say the advocates of longer terms, staff turnover would likely be decreased, so that job proficiency would be improved and staff recruitment facilitated. A four-year term would allow the secretary to provide training to develop specialized staff skills. Finally, a secretary with a quadrennial term could devote more time to designing and implementing specific programs within his office. The benefits of a change from a two-year to a four-year term, in this view, would be almost as great for Texas—the only state with an appointive secretary serving a two-year term—as for states with elective secretaries, whether they be chosen by the people or the legislature.

The areas of reform discussed above are indicative of the range of the criticisms leveled against the present structure and operation of the office of state secretary of state. The office itself has long been demeaned by students of state government and public administration. In 1915, the New York state constitutional convention commission fairly summarized the then prevalent attitude among scholars and government officials concerning the merits of state secretaryships when it argued that, in New York, "the present working relation of the office of secretary of state has about the same significance and relative importance as the vermiform appendix in the human body."[18] More than a half-century has passed since the commission voiced its derogatory characterization, but during the interval criticism of the office of secretary of state has been almost constant and the judgment of its observers has normally been severe. Seeing little in the office worth redeeming, some scholars have suggested that the position should be abolished and its functions reassigned to other existing state agencies. For example, writing in 1938, Kirk H. Porter claimed, "Any department of state loaded with such a miscellaneous collection of duties probably ought to be liquidated in the interests of sound integration."[19] He continued by saying, "There is no reason for having a department of state. This department could be largely supplanted by . . . (a) proposed bureau of records. Functions which would not belong in such a bureau should be located in departments where they do belong."[20] Eight years earlier, the Brookings Institution, in a study of North Carolina's government, recommended the abolition of the office of secretary in that state, claiming, "It is one of the last vestiges of Colonial government and should be eliminated in the modern structure of government."[21] In another study in 1932, the same organization argued that the office of secretary of state in Alabama should be abolished, stating,

> The Secretary of State's Office has no duties which justify its existence as an independent department. That it exists as such in other states is attributable to conditions which no longer exist and to tradition rather than administrative need. . . . It is believed, accordingly, that the Constitution should be amended so as to abolish the office of Secretary of State and that its functions in general should be transferred to the proposed Bureau of Records in the Executive Department. There are certain functions, however, which should be transferred to other departments.[22]

Thirty-one years ago, W. Brooke Graves declared that "it is possible to argue both that the office should be retained, and that it should be abolished, although the majority of students are disposed to favor the latter alternative."[23] This popularity enjoyed within academic circles during the early decades of the Twentieth Century by the proposal to abolish the position of secretary of state derived, in large measure, from the common conception of the office as a refuge for political hacks —a "dead-end" post with insignificant duties and no discretionary authority. Reformers at that time saw the office as one handling a melange of functions indiscriminately lumped together under the supervision of a powerless secretary—in violation of many accepted tenets of sound administrative organization and procedure.

While modern scholarly opinion remains largely in agreement with earlier estimates of the character of the office, few students of state government would today argue that the secretaryship of state should be abolished. In the words of Russell W. Maddox and Robert F. Fuquay,

> There is not and never has been any significant support for this proposal. Even the recommendations of "little Hoover Commissions" have not gone so far. The office has long been an accepted part of state government, and its incumbent is usually a politically important individual, one who may have aspirations for the governorship. Because of tradition, administrative importance, and political influence, the office of secretary of state will continue to be a significant agency of state government.[24]

Since abolition of the office would normally require a constitutional amendment, most scholars now argue that this reform proposal unrealistically ignores the difficulties involved in securing popular ratification of such a radical structural change. Some contend that the merits of the idea hardly justify the effort required to promote its acceptance. To others, the office is so minor and insignificant that it makes little practical difference whether it is retained as it is, altered, or abolished. As these indifferent observers see it, few citizens or scholars have expressed any concern for the future of the secretarial office, one way or the other. They assert that public and academic apathy regarding the issue implies—if not satisfaction with the status quo—at least a tolerance for things as they are. Since there appears to be no real sentiment for change, and there are so many more important things to do in the view of those sharing this persuasion, they believe the attention of reformers would be better focused elsewhere.

Most reviewers of the situation have now concluded that if the office were abolished, the clerical and housekeeping services it provides would still have to be performed. If they are not performed by the secretary of state, some other official or officials would have to discharge these responsibilities. Would an archivist or a director of a bureau of records be less of a secretary of state, they ask, because he did not bear the secretarial title, even though his duties were comparable? Indeed, they agree with William Shakespeare, who said in *Romeo and Juliet,* "That which we call a rose by any other name would smell as sweet." To abolish the secretaryship without eliminating its duties would be like breaking a vase while the flowers within remain—some other receptacle must then be found to house the contents of the destroyed vessel. A centralized depository for state records and public papers is now an acknowledged necessity in modern state government. To retain this feature of the secretary's functional role after his post is abolished the legislature would have to create a related agency headed by an official with a different title. While this official might not perform all of the extraneous duties assigned to a secretary of state, his major tasks would be similar to those of a secretary. Under these conditions, abolition would amount to nothing more than the redistribution of certain secretarial duties and a change in the name and status of the secretary. Recognition of the futility of this semantic game has served to diminish the importance of the abolition proposal among current students of public administration.

Nonetheless, some observers have espoused a modified version of the plan to abolish the office of secretary of state. They have generally received their inspiration from the Hawaiian constitution, which assigns the duties performed by the territorial secretary of state to the state's Lieutenant Governor. To these individuals, combining the two offices would not eliminate the secretaryship in fact, even if it would do so in name. The same secretarial services would continue to be performed by a constitutionally elected officer within the executive branch of the state government, only his name would be changed from "secretary" to "Lieutenant Governor." According to the advocates of this plan, its adoption would strengthen the office of Lieutenant Governor by making him a useful and active participant in state governmental affairs. The Lieutenant Governor would be given the opportunity to demonstrate his ability to discharge his assigned responsibilities and to develop his administrative talents, thereby better preparing him for possible elevation to the governorship. He would have a more important function in state government than presiding over the senate and waiting for his possible inheritance of the Governor's office. He could become a full-time executive officer, instead of the part-time public servant he now is in many states. To its supporters, this reform would affect an economy of state funds and personnel. Many staff duplications in the two offices could be eliminated, along with the secretary's salary. The Lieutenant Governor, in turn, would perform enough public functions to justify his salary. As the alter ego of the secretary of state, the Lieutenant Governor would be a figure of considerable power and prestige in the state executive branch. Consequently, in this view, the secretaryship would not be destroyed; rather, it would be strengthened by the proposed transformation. Although its identity would be obfuscated, its essence would remain unchanged.

The method of selecting the secretary has been the subject of one of the most persisting debates relating to the secretarial office. Since the proposal to abolish the secretaryship has been largely abandoned by scholars, academic observers have shifted their attention to the consideration of possible alternatives to direct popular election of the secretary of state. In general, they have mounted an attack against direct election as a cause of potential discord in the executive branch. These observers, favoring an appointive secretary, have contended that the Governor should be free to choose someone for this position who will cooperate with him, share his outlook and goals, and be responsible to him as the state's chief executive officer. A secretary who is independently elected, they assert, would not be under the Governor's control, and consequently there would be no assurance that he and the Governor would work together as a team. If an elected secretary does not reflect the Governor's views on public matters, he may seek to frustrate the Governor's program, thereby decreasing executive efficiency and harmony. An independently elected secretary may be politically motivated—either by partisan considerations or personal ambitions—to sabotage the plans of the Governor, yet the chief executive so obstructed by secretarial subversion would be unable to dismiss his challenger from office. Under such conditions, there would probably be a breakdown of governmental efficacy—state administration would be hamstrung in many areas by quarreling between the two officials. According to this view, if the Governor is to be responsible for the conduct of executive affairs, he must be given the authority requisite to meet his responsibilities. A Governor who is no more than *primus inter pares* among coordinate executive officials cannot effectively direct the activities of the branch of government he heads, nor can he expeditiously implement the programs he has been elected to carry out. Only a Governor who is empowered to select his key aides and department heads, say the advocates of an appointed secretary, can comfortably view his impending administrative tasks with the confidence that he will receive the cooperation and support he needs from his subordinate executive officers. They contend that altering the method of selecting the secretary from popular election to gubernatorial appointment would strengthen the position of the Governor by making the lines of control and responsibility more directly convergent upon him. The Governor would be better able to direct the activities of the branch of government he heads and his executive commands would carry more authority than they sometimes do with a popularly chosen secretary.

Those favoring an appointive secretary also claim that the average voter is unfamiliar with the secretary's duties and powers. They argue that the public is apathetic toward the office and its candidates and is normally unable to make an intelligent and rational choice between the contending secretarial aspirants. The electorate's demonstrated low interest in secretarial contests reduces the usefulness of direct election as a device for securing qualified officeholders and as a forum for presenting alternatives to existing programs. Direct election does not increase an incumbent's responsiveness to the public or "keep him honest and efficient" under these conditions, according to its critics. Too often, they assert, name recognition or some factor other than job performance is the popular criterion for casting a ballot for the post. Furthermore, in this view, the reduction in ballot length attendant upon the removal of the secretary to appointive status would allow the public to focus their attention more exclusively upon the issues and candidates for positions of greater importance and concern.

The adherents of this position, noting the high costs of campaigning—in terms of time, money, and energy—contend that the relatively low compensation attached to most state secretarial positions does not serve as adequate remuneration for the physical and financial expenditures which must be made to obtain the office through direct election. Even the personal satisfactions of the office, in their view, are insufficient to merit the necessary sacrifices of exhaustive electioneering. Popular election, they assert, is just too difficult and too expensive a method for selecting secretaries of state. In those states in which the secretaryship is traditionally reserved for occupancy by a woman, the arduous rigors of campaigning and the hardships imposed by frequent absence from the home for long periods of time are particularly undesirable concomitants of direct election. To the proponents of selection by appointment, the arguments that it is necessary to retain an elective secretary are not sufficiently convincing to justify subjecting a woman to the burdens of a political campaign. According to their position, a Governor who could offer immediate appointment to the secretaryship without the necessity of risking the hazards of election could recruit men and women of equal or greater capability to occupy the post than those who might seek the office at the polls.

Finally, say those of the appointive persuasion, the duties attached to the office of secretary of state are essentially routine, clerical, and non-discretionary. In some states, the secretary's functions are wholly ministerial. Since the secretary normally makes but little public policy, the advocates of appointment contend that there is no real need to select him through popular ballot. Were he involved in the formulation of major governmental programs, democratic theory might suggest that he be directly responsible to the public; but, as he is not a significant decision-maker, the imperative for him to serve under the mandate of the people is nonexistent. Even in states in which the secretary does wield important discretionary authority, his policy-making duties are usually tangential to his clerical tasks and could easily be re-assigned elsewhere, so that the office could safely be made appointive. Only in the states where the secretary is the first in the line of succession to the governorship do the partisans of appointive secretaries see any merit in the direct election of this official. But in these few states, they would still probably maintain that the secretary should be removed from the line of succession and made appointive.

Sound administrative practice, in their judgment, dictates the necessity for a subordinate rather than a coordinate secretary of state.

The sentiment in favor of the gubernatorial appointment of secretaries of state, as strong as it may be within the academic community, does not appear to be dominant among other observers of the secretarial office. Particularly among governmental officials, politicians, and present and former secretaries of state, there is considerable support for the retention of the elective principle in the selection of state secretaries. Out of a sample of 155 current and former secretaries, other state officials, and political leaders responding to a survey request for their opinion on the most appropriate method of selecting the secretary of state, only 30.3 percent of the respondents advocated an appointive secretary, while 58.7 percent believed the secretary should be popularly elected. Six persons surveyed argued that the office should be abolished and only four individuals favored legislative selection. Seven respondents contended that it made no practical difference what method of selection was used, since the post was too unimportant to have the manner in which it was filled affect the conduct of state affairs. Isolating the present and ex-secretaries surveyed, the sentiment in favor of direct election appears to be even more pronounced. Of the 71 individuals in this category indicating a preference, 67.6 percent supported popular election. Approximately 28.1 percent contended that the secretary should be appointed by the Governor, with most of those expressing this conviction coming from states with appointive secretaries. None of the current or former secretaries advocated abolishing the office, although two supported legislative selection (both of whom came from states using this method) and one felt it made no difference whether the secretary was appointed or elected.

One of the major arguments advanced in favor of the popular selection of the secretary of state is that his office has more policy-making authority than commonly recognized, particularly in the important areas of elections, corporation regulation, securities, and professional licensing. In addition, the secretary commonly serves on several powerful boards and commissions which formulate policy in a variety of areas of importance to the state and its residents. It is asserted by those championing direct election that policy makers, such as the secretary of state, should express the will of the people in the performance of their duties and that that method of selection should be employed which is calculated to determine the common will in the most direct fashion. Popular election is, to them, the best means of gauging the public mandate and for holding an official periodically accountable to his constituents. The secretary of state, as the representative of the public, should be chosen by those he represents and owe his first allegiance and responsibility to them, rather than to the Governor or legislature, according to this view. If the secretary is appointed by the Governor, say those opposed to this arrangement, he is likely to be isolated from the public and his program will normally be only indirectly influenced by the citizenry. Elective secretaries, they say, will be more responsive to the changing needs and expressed desires of the people.

In much the same vein, it is argued that secretaries who are first or second in the line of succession to the office of Governor should be popularly elected because of the power and authority they may inherit. The people, in this view, should have a voice in the selection of those persons who may be called upon to assume the chief executive office in their state. To entrust an appointive official with the policy-making authority of the governorship through succession would be undemocratic and unwise, since such an officeholder would not be subject to the normal political restraints of an elective official. The public would not have the opportunity to approve such an appointee or his policies at the polls prior to his assumption of the Governor's office. In addition, say the supporters of an elected secretary, the Governor, as a political leader, needs some public endorsement of his program to effectively command his party's forces in the legislature and gain cooperation among other elected executive officers in the implementation of his policies. An appointive secretary who succeeds to the governorship would have an untested popularity among the voters and might, consequently, find political obstacles confronting him which would not be present for a gubernatorial successor who had a political base of support among the voting population.

While advocates of an appointive secretary generally believe that their proposal will help remove the administration of department of state functions from the realm of politics, their critics sometimes contend that just the opposite is true. To these persons, the office of an appointive secretary too frequently becomes a "political football," distributed as a reward to faithful party workers. In their opinion, a secretary whose re-appointment or continuation in office depends upon the contribution of his presence on "the executive team" to the Governor's political popularity is more likely to be politically motivated in the performance of his duties than an independently elected secretary. An appointed secretary must normally respond to political pressures initiated by the Governor and designed to improve his chances for re-election; for he realizes that if the Governor is not returned to office at the next election, he will likely lose his position by default. Furthermore, the proponents of direct election argue that with each partisan change in the governorship, there will normally be an attendant change in the secretaryship. Frequent rotation of occupants of the secretarial office, of course, creates instability and uncertainty among staff personnel—even if they are permanently employed under civil service. The lack of continuity in office cannot help but affect administrative efficiency and the problem is that much more exacerbated when turnover in the secretaryship is habitually accompanied by an exodus of experienced personnel holding patronage positions.

Those observers who emphasize the political involvement of an appointed secretary usually acknowledge the possibility that direct election of secretaries may also produce a rapid turnover in secretarial incumbents, but they point to the historical tendency to retain elective secretaries through successive terms for long periods of time. They contend that there is generally greater continuity in office for elective secretaries than for those holding office under gubernatorial appointment. From this premise, they argue that the staffs of elective secretaries are more stable, more experienced, and more certain of the programs they should be implementing. They also suggest that elective secretaryships are less likely to become sinecures granted to persons for past party labors. According to their perspective, direct election permits open access to the office of secretary of state, so that any interested individual can seek selection to the post—not just persons qualified in the eyes of party leaders by prior work for the organization. A secretary directly chosen by the people, in this view, need be beholden to no political interests other than his own. He is more likely to be independent in his thinking than an appointive secretary, since he is free of gubernatorial control and his fate is not so intimately connected with the popularity of the Governor. While he may be politically ambitious in his own right, he is unlikely to be a "patsy" for the Governor or his party. If he is a political hopeful, he will strive to enhance his own image, not that of the Governor. He will, say the proponents of an elective secretary, seek to establish a record of service and efficient performance in his office, using the opportunity his position provides to prove his fitness for advancement to higher office. Thus, his ambition may serve to promote greater administrative efficiency in the secretarial office. An elective secretary untempted by political ambitions may, through successive re-election, so consolidate his position that he can isolate himself almost entirely from partisan consideration, the defenders of the elective principle believe. As a result, he can sometimes become almost a professional administrator supervising the smooth operation of his department with the assistance of an experienced staff. Whether the secretary is ambitious or not, however, those adhering to the position that he should be elected maintain that the operation of his office is likely to be more efficient than the operation of an appointive secretary's department.

An elective secretary's demonstrated ability to survive political upsets is viewed by some observers as an important asset to a viable two-party system on the state level. According to those who see political merit in an elected secretary's longevity in office, successive re-election enables a party to retain some influence over the conduct of state affairs, even when it no longer has control over the governorship or other executive offices. As long as an opposition secretary remains in office, the minority party he represents is assured of some political patronage which it can use to perpetuate its existence and strengthen its position *vis-a-vis* the majority party. In addition, the party out of power will, if it controls the secretaryship, continue to have an observation post within the executive. The secretary, in such a situation, can act as the minority's "watchdog," preventing questionable administrative practices in other executive offices from being "covered up" out of political expediency. Thus, he can serve as a check on the Governor and his administration.[25] Possession of the secretary's office may also provide the minority party with a prospective candidate for Governor—an official whose name is familiar to the public and whose position of responsibility commends him to the attention of his party. As the highest statewide elected official of his party, he may even be recognized as its leader, making his recruitment for the next gubernatorial contest all the more probable. The public, too, would likely benefit from a situation in which the Governor and secretary represented different parties, say those advancing this argument. They would have the opportunity of reviewing the records and comparing the performance of both officials. If, in a future gubernatorial election campaign, the two should then oppose one another, the voters would have a basis for choosing between them.

Direct popular election of the secretary of state serves another educational function, according to its supporters. As they see it, an election campaign helps to make the secretary and his work known to the public. For the brief period preceding an election, at least, the secretary receives some attention from the press and other news media. He is given the opportunity to defend his record, while his opponents are similarly permitted to level their criticisms against the manner in which he has performed his secretarial duties. The publicity resulting from the campaign causes the public to focus, however fleetingly, upon the office and its problems. The opportunity to inform the electorate about the functions and powers of the secretarial position afforded by an election campaign is, of course, absent for the appointed secretary. When the position is filled by gubernatorial appointment, the public normally has little chance to acquaint itself with either the incumbent or his responsibilities. The relative invisibility of the secretaryship to the average citizen—which caused one observer to call it "the department nobody knows"—may not be eliminated by popular election, but it can sometimes be partially corrected by a serious election campaign. If one subscribes to the notion that an informed citizenry is the surest safeguard against corruption among civil authorities, then, in this view, he would probably agree that the secretary of state is subject to closer public scrutiny when he is popularly elected and hence is less likely to be guilty of malfeasance in office.

Some observers favoring popular election contend that an elective secretary broadens the representative character of the state executive branch of government and grants the people a greater voice in the determination of public policies. They note that the electorate which chooses the Governor may not be identical to that selecting the secretary of state. Split-ticket voting is a common feature of American elections and, where this occurs for the gubernatorial and secretarial offices, it may mean that the popular majority which supported the victorious candidate for one office was not the same as that which elected the candidate to the other office. Thus, the Governor and secretary of state may represent overlapping constituencies. In addition, the electorate is offered an expanded choice of policy options when it is permitted to choose between the programs of both gubernatorial and secretarial contenders, rather than solely between the policies advocated by candidates for Governor.

Spokesmen for the concept of the elective secretary further assert that voters have a right to choose their officials. In line with established Jacksonian principles, these expositors of election argue that it is more democratic to allow the people to select the secretary of state than to make him an appointive executive officer. They believe that the secretary, as a representative of the people implementing important public programs, should be the clear choice of the electoral majority. An elected secretary, they claim, is more responsive to the will of the body politic, since he must periodically answer to the people for his actions in office. When he is selected at the polls, the public has a greater control over him—they can turn him out of office or retain him, according to their pleasure. If they are not satisfied with his performance or policies, they can easily replace him with another aspirant for the position. The advocates of this proposition charge that an appointed secretary is too remote from the public to respond to their demands. At least one step removed from the ballot, he is immune from many public pressures—his isolation making popular access to him difficult and unreliable.

Another Jacksonian idea propounded by the champions of direct election of the secretary is that a concentration of authority in the person of the Governor is to be avoided as dangerous to representative government. They believe that an elective secretary, along with other executive officials chosen at the polls, helps prevent a Governor from wielding too much power. They tend to view with alarm the trend toward a shorter ballot, asserting that the Governor, in many states, is beginning to assume near-dictatorial powers. If the entire structure of the state administration comes to rest upon the merits of one man —a Governor empowered to appoint all of his subordinates—then the public is placed at the mercy of his particular attributes and vices. To them, the test of a good administrative organization is the insurance it provides against the abuse of authority. If he can appoint his "cabinet" of department heads, a Governor unworthy of his office can wreck untold havoc with the conduct of state affairs by selecting corrupt, inept, or contentious men as his lieutenants. On the other hand, greater protection against such a calamity is found where the public is given the opportunity to weigh the characters of candidates for executive offices during a campaign and select the most qualified at the polls. An independently elected secretary, treasurer, or auditor, they claim, would be less likely to share the faults of a corrupt or inefficient Governor than one who held office by the choice and sufferance of the chief executive.

Finally, observers who support popular selection of the secretary claim that direct election has received the widespread acceptance of the public. It has been and is the method traditionally accepted and approved by the citizenry in at least 39 states. Persons of this persuasion argue that elective secretaryships have withstood the tests of time and have satisfactorily discharged their responsibilities. They assert that, since there appears to be no overwhelming sentiment in favor of a change to an appointive secretary in most states, such a reform is unnecessary.

This same conservative philosophy has been used to defend the *status quo* in Maine, New Hampshire, and Tennessee, where the secretary of state is chosen by the legislature. In these three states, this long-standing means of selecting the secretary has become somewhat cloaked with the mantle of hallowed tradition. It has been employed there since the early post-Revolutionary days and, according to its supporters, has not caused any serious administrative problems. To them, change is unwarranted by past experience or future necessity. But, say the vast majority of political scientists and students of public administration concerned with this problem, the few admirers of legislative selection have failed to recognize the potential difficulties of this method which may arise as these states move closer to competitive two-party systems. As the situation is viewed by the academic community, a diordinate secretary in the future may frequently be chosen by a legislature controlled by a party different from that of the Governor. When this happens, partisan discord between these two officials (or between the Governor and legislature for which the secretary is an agent) may disrupt the smooth operation of the executive branch. Furthermore, a secretary so chosen will owe his primary allegiance to the legislature, rather than to the people or the Governor. He would likely do its bidding in the performance of his administrative tasks. Such a situation is commonly considered to foster undue interference in executive affairs on the part of the legislature. It is asserted that legislative selection of the secretary is a violation of the long cherished principle of separation of powers. Its critics charge that a secretary chosen by the legislature would constitute an administrative "fifth column" for the law-making body, weakening the authority of the Governor over the conduct of state business and restricting the usefulness of whatever leadership he might otherwise have been able to exert over the executive branch of government. Thus, legislative selection has been almost uniformly condemned by scholars as archaic, obsolete, and unsound. Observers have only rarely suggested extending this means of choosing the secretary beyond the confines of the states already using it. Instead, they have generally recommended its elimination in those few states where it remains as a potential obstruction to administrative harmony and efficiency.

While most scholars, government officials, and incumbent or former secretaries of state acknowledge the possibility of effecting improvements in the structure of state secretariats, there continues to be a strong minority opinion that denies this basic premise of reform proposals. A number of observers have expressed their satisfaction with the present structural arrangement of the secretaryships in their states. Generally, they have viewed the operations of the secretarial office as efficient and well-organized. Some of these "standpatters" have been so thoroughly convinced of the merits of the selection method used in their states that they have advocated that other states follow their pattern. Thus, they simultaneously fall within two categories—those of persons suggesting structural reforms (in other states) and persons defending the *status quo* (in their own states). Others have argued that the office is so unimportant and its duties so routine that discussion of reform is mere mental exercise. To them, it makes little difference how the secretariat is organized or managed, since any change would have little impact on the general operation of state government. Still another group of persons believe that reforms are too difficult—and may even be impossible—to achieve, given the almost insurmountable political, constitutional, and statutory obstacles which would have to be overcome. They do not consider the proposals for reform thus far advanced worth the effort necessary to implement them.

All of the proposals for reform presented here have been adopted on a limited scale in one or more states. It seems unlikely that any one measure advocated by the spokesmen for the various schools of thought regarding improvements in the secretarial office can be successfully implemented in every state. Some defenders of the *status quo* may be correct when they assert that the secretariat in their state is presently organized in the fashion most suitable to the conditions prevailing within their commonwealth. The feasibility of different schemes for reorganizing state departments of state must, of course, be considered by particular states in the light of their own experiences and peculiar social and political environments. It is reasonable to assume, however, that most state secretariats can be improved and that continued experimentation and innovation in this area will reap beneficial results for the government and the public it serves—in terms of greater efficiency, economy, and harmony in the administration of governmental programs and policies.

Shortly after the turn of the century, George Washington Plunkitt, a sachem of Tammany Hall, declared that reformers were only morning glories that look lovely in the morning and wither up at night.[26] Whether Plunkitt's characterization of reformers will prove applicable to the advocates of changes in the office of state secretary of state whose arguments have been summarized above remains to be seen. But one thing seems certain—the office itself will continue its evolutionary career along diverse paths, its structure and operation modified to meet the challenges presented to it by the unique circumstances of particular states. It is unlikely to be abolished because the functions it performs are essential to the effectiveness of a governmental bureaucracy. The secretaryship has demonstrated its value as a service agency within state government, carrying out innumerable housekeeping tasks which, though seldom fully appreciated, are nonetheless significant and necessary.

Hopefully, coming generations of scholars will focus more attention on the office than it has received in the past; for, if state governments are to survive as viable units within the federal system of American government, their institutions must be strengthened to meet ever changing conditions and demands placed upon them. This strengthening can only be achieved by continual examination and evaluation of those institutions as they relate to their environmental setting. If state secretariats, as integral parts of state governments, are to meet their future obligations, their structures and functions must be periodically reviewed with an eye toward their improvement and adaptation to new circumstances. When the heritage of state secretarial service to the body politic is more widely disseminated through the work of students of state government, the office will cease to be "the department nobody knows." With increased public recognition of their contributions to the several states and their inhabitants, secretaries of state can then face a confident future of even greater service to our generation and our posterity.

Footnotes

1. John Stuart Mill, *On Liberty*, New York, Appleton-Century-Crofts, 1947, p. [illegible].
2. *People v. McCullough*, 254 Ill. 9, [illegible] N.E. 156 (1912).
3. Arthur N. Holcombe, *State Government in the United States*, New York, The Macmillan Company, 1919, p. 316.
4. *The Executive Department*, Constitutional Convention Bulletin No. 9, Springfield, Illinois, Illinois Legislative Reference Bureau, 1920, pp. 688-689.

5. Everett Kimball, *State and Municipal Government in the United States*, Boston, Ginn and Company, 1922, pp. 150-151.

6. Walter F. Dodd, *State Government*, New York, The Century Company, 1922, p. 236.

7. Austin F. Macdonald, *American State Government and Administration*, New York, Thomas Y. Crowell Company, 1955, p. 229.

8. Oliver P. Field, Pressly S. Sikes, and John E. Stoner, *Bates and Field's State Government*, New York, Harper and Brothers, 1949, p. 315.

9. Russell W. Maddox and Robert F. Fuquay, *State and Local Government*, Princeton, New Jersey, D. Van Nostrand Company, Inc., 1962, pp. 93-94.

10. Charles R. Adrian, *State and Local Governments*, New York, McGraw-Hill Book Company, Inc., 1960, p. 277.

11. Charles S. Hyneman, "Administrative Reorganization: An Adventure into Science and Theology," *Journal of Politics*, February, 1939, pp. 62-75.

12. A long cherished principle of law stresses the need for ambiguity in legislation governing the actions of administrators, "Lex non exacte definit sed arbitrio boni viri permittit." ("The law does not define exactly, but trusts in the judgment of a good man.") *Bissell v. Briggs*, 9 Mass. 475, 6 Am. Dec. 88.

13. As Ernst Freund has stated, "The ambiguities of language afford constant opportunity for the exercise of a praetorian power of supplementing the letter of the law, and the spirit of construction will frequently determine the living principle of statute or constitution." See Ernst Freund, *Standards of American Legislation*, Chicago, University of Chicago Press, 1965, p. 275.

14. David B. Guralnik, editor, *Webster's New World Dictionary*, Cleveland, The World Publishing Company, 1958, p. 670.

15. Kirk H. Porter, *State Administration*, New York, F. S. Crofts & Company, 1938, p. 59.

16. *Ibid.*, p. 66.

17. Of course, four-year terms for the Governor and secretary of state should coincide. If they do not expire at the same time, an anomaly occurs which has consequences similar to the situation in which the Governor serves a four-year term and the secretary remains in office for a two-year period. In fact, the possibility for partisan conflict between the two offices may even be greater, since the mood of the electorate may change sufficiently during the interval between the election of the secretary and the election of the Governor to reduce the secretary's party to a minority. In addition, such an arrangement precludes the possibility that a secretarial candidate may "ride the coattails" of his party's gubernatorial nominee and benefit from straight ticket voting. Four-year secretarial terms which overlap with four-year gubernatorial terms are currently found only in Tennessee and Oregon.

18. New York State Constitutional Convention Commission, *The Constitution and Government of the State of New York*, New York, Bureau of Municipal Research, 1915, pp. 108-109.

19. Porter, *op. cit.*, p. 60.

20. *Ibid.*, p. 74.

21. Institute for Government Research, *Report on a Survey of the Organization and Administration of the State Government of North Carolina*, Washington, D.C., The Brookings Institution, 1930, pp. 3-4.

22. Institute for Government Research, *Report on a Survey of the Organization and Administration of the State and County Governments of Alabama*, Washington, D.C., The Brookings Institution, 1932, p. 130.

23. W. Brooke Graves, *American State Government*, Boston, D. C. Heath and Company, 1936, p. 358.

24. Maddox and Fuquay, *op. cit.*, pp. 93-94.

25. An elected secretary of the same political affiliation as the Governor may also act as a check upon his chief executive, preventing improper administrative acts from being hidden from the public view. Be he motivated by personal ambition or conscientious dedication to the people's welfare, a "watchdog" secretary could protect the public interest through the use of his independent position to disclose or obstruct executive wrongdoing.

26. William L. Riordon, recorder, *Plunkitt of Tammany Hall*, New York, E. P. Dutton & Company, Inc., 1963, p. 17.

APPENDIX E

THE ATTORNEY GENERAL*

By Byron R. Abernathy

Should the attorney general necessarily see eye-to-eye with the governor, and should he or should he not be the latter's appointee?

The office of attorney general has an ancient origin in the British legal system dating back prior to the thirteenth century. The title *attornatus regis* is first encountered in English history in the year 1253. In 1472, William Hussee was appointed attorney general of England with authority to appoint deputies to act for him in any court of record. The office appears in American colonial governments and was continued in the state governments which succeeded them.

In British experience, the office of attorney general has always been appointive, never elective, the attorney general being appointed, formally at least, and in earlier days in fact as well, by the monarch. The office was a constitutional one in at least ten of the thirteen original states established following the Declaration of Independence, although the duties of the office were not described in the constitution. The attorney general was appointed in all of these original states whose constitutions provided for the office, with appointment by the legislature, and by the governor with consent of the council, about equally divided.

As the process of administrative decentralization developed in American states with the direct popular election of many public officials, the office of attorney general fell under its influence the same as other state administrative and judicial offices. By 1860 eleven of the thirty-three states then in the Union provided for the popular election of the attorney general. The office had become elective in twenty-eight of the thirty-eight states by 1880; in thirty-five of the forty-five states by 1900; in thirty-nine of the forty-eight states by 1920;[1] and is elective in forty-two of the forty-nine states in the Union in 1959.

The office existed in every one of the forty-nine states in the Union in 1959, and would appear to be contemplated in the fiftieth state—Hawaii—although if it is established there it will be done by statute, as the constitution makes no specific mention of the office. It is a constitutional office in forty-four states, and is or will be statutory in the other six, including Alaska and Hawaii. As pointed out above, the attorney general is popularly elected in forty-two states. He is appointed by the governor in Alaska, New Jersey, Pennsylvania, and Wyoming; by the governor and council in New Hampshire; by the legislature in

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*Reprinted from Byron R. Abernathy, Some Persisting Questions Concerning the Constitutional State Executive, Governmental Research Series No. 23 (Lawrence: University of Kansas, Governmental Research Center, 1960), pp. 32-49.

Maine; and by the Supreme Court in Tennessee. If the office is created in Hawaii, he will be appointed by the governor.

Thus it appears that as far as the states are concerned, the office of attorney general tends very definitely to remain an office which is largely independent of the governor. Furthermore, there is no evidence of any pronounced trend to modify this position of independence. When administrative reorganization was effected in New York in 1925 and 1938, it did not extend to bringing the attorney general under the governor's supervision, control, and appointive power. Reorganization in Georgia and Missouri also left this office elective. The revised New Jersey Constitution provides for appointment of the attorney general by the governor, as had been the case before the 1947 revision, but nevertheless makes special provision to assure a degree of independence of the governor not enjoyed by other department heads except the secretary of state, by making his appointment *for the governor's term of office.* The attorney general and secretary of state in New Jersey do not serve at the governor's pleasure as do other heads of departments. They were specifically excluded from those officials who should serve at the pleasure of the governor because they were held by the constitutional convention to be "in a different category from the heads of other departments who are not specifically named in the Constitution," and because they "have additional state-wide functions." The Alaska and Hawaii Constitutions alone of the recently drafted constitutions fail to give the attorney general a privileged status among executive department heads. Both are patterned in this respect after the Model State Constitution of the National Municipal League which neither gives constitutional status nor privileged position to the office, but merely leaves it to the state legislature to create not more than twenty departments, one of which it may be presumed will be a department of law or department of justice.

The policy followed by the Alaskan, Hawaiian, and Model State Constitutions in this respect is in the tradition of the federal administration and its Department of Justice, and is consistent with that advocated by most students of state administration, and professional writers on the subject. These writers are virtually unanimous in their conclusion that the organization of administrative departments should be flexible, therefore left to legislative determination. Next, they agree that the attorney general should be at the head of a state legal department which should embrace the apprehension and prosecution of all criminals, as well as the providing of legal advice to public officials, and representing the state in legal matters to which it is a party; that as such he should supervise local prosecuting attorneys; and that he should be appointed by, responsible to, and removable by the governor, in the same manner as the heads of other administrative departments.[2]

The relatively independent status enjoyed by the attorney general in most American states means that he is under no compulsion to see eye-to-eye with the governor in matters of administration policy,[3] that in actual practice he is rarely the latter's appointee, and that there is certainly no marked tendency in state constitutional practice today to modify seriously that status. On the other hand, political scientists and students of state administration generally continue to urge that for purposes of administrative efficiency and public responsibility, this independent status should be compromised, and the attorney general should be appointed by, removable by, and responsible to the governor, as the person responsible for the faithful execution of all state laws. Practice thus persists in diverging materially from theory, and in spite of professional admonition to the contrary for many years, constitution makers continue the independent status of the attorney general. The question therefore persists, should the attorney general really see eye-to-eye with the governor and be his appointee, as recommended by students and the theorists? Or should he remain to a large degree independent of the governor as he is in practice in most states?

In an attempt to get the reaction to this question of persons immediately and directly involved, both the attorneys general and the governors of all the states were queried as to their attitudes on the question. Thirty-five attorneys general and twenty governors replied. As is perhaps to be expected, most replies indicated a preference for the system under which those replying worked and with which they were familiar, although this was not uniformly so.

Among the thirty-five attorneys general who replied, the overwhelming majority took the position that the attorney general should not be expected to see eye-to-eye with the governor, but should be independent of the governor, and therefor should be elected by and directly responsible to the voters. Twenty-eight of the twenty-nine popularly elected attorneys general who replied took this position. One attorney general, in a state in which the attorney general is presently directly elected by the people, indicated that "after six years experience in the Attorney General's office" he had concluded that the attorney general should be appointed. He did not feel that he should be directly responsible to the governor to the extent of serving at his pleasure, however, and did not want the attorney general to be removable by the governor. The reasoning advanced in support of this conclusion is interesting, and becomes the more so in view of the fact that his experience has been with a constitutional and an elective attorney generalship.

> The reason for these two conclusions is, first, that the Attorney General is or should be primarily interested in the administration of justice and not in political accomplishment. It is a rare case, indeed, that should have the decision based upon the number of votes involved. As a matter of fact, I can recall no circumstance when it should be done in this office. I do not believe, however, the Governor should have the removal power over the Attorney General, but I believe the power to remove should be lodged in either the Legislature or in the Supreme Court of the state because I do not feel that a Governor is in any different position than large blocks of voters so far as the decision is concerned pertaining to what is right or wrong in a law office. I think the decision in opinion writing and in handling of cases for the State should be entirely free from political pressures.

All others who questioned the wisdom of the popular election of the attorney general were incumbents of that office who themselves were appointed. One attorney general, who is a constitutional officer appointed for a term exceeding that of the governor, and who may be removed from office only in the same manner as a judge, considered it desirable that the attorney general be independent of the governor, but preferred appointment over direct popular election. He suggested appointment for a term of years "to exceed the gubernatorial term." He would require that the position be "non-political and that appointments should be made from a list of attorneys certified by the Bar Association as in its opinion responsible, capable, and qualified without regard to party." In opposing direct election, he commented:

> It has been my observation generally that appointed Attorneys General who serve for a term of years are freer generally in the expression of opinions on controversial issues and perhaps freer to express their true inner opinions as distinct from the growing fear that if this done it may cost votes. I have never believed that the price of votes was too good an influence on chief law enforcement officers.

Another attorney general who is appointed by the governor and confirmed by the Senate, and who serves at the pleasure of the governor, expressed preference for this arrangement; since "In an election you run the risk of having the voters select as an Attorney General a man who may not only be in complete disagreement with the governor on important policy questions but may actually be one of his outspoken political rivals." Another expressed approval of the plan whereby the attorney general is selected for a long term by the state Supreme Court, since that "results in the enjoyment by the Attorney General of a great degree of independenc from politics and from domination by the Executive branch of government." No attorney general now appointed favored election, while one elective attorney general favored appointment.

It is interesting to note that the attorneys general favoring appointment gave as their reason for favoring that method, essentially the same reason most of those favoring making the office elective gave in justification of their choice, namely that it left the attorney general indpendent and free of political considerations in reaching his legal decisions and opinions, and in enforcing the laws. Those favoring direct election appeared to see political considerations dominating the popularly elected governor, but not themselves, and therefore argued that they should be free of the governor's control which was apt to be influenced by the political considerations to which the governor is subject. Those who favored making the office appointive, on the other hand, seemed to see political considerations influencing the conduct of the popularly elected attorney general himself, and saw in appointment, the device for freeing that official from the undesirable influence of those considerations.

The twenty governors who replied to the request for their opinion on this question tended to be more equivocal and less firm in their positions than the attorneys general tended to be, although some who took a very forthright stand in favor of making the attorney general fully and immediately responsible to the governor, by giving the governor full freedom to appoint and remove the attorney general, represented exceptions to this generalization. Here again, there was also an obvious tendency to at least accept arrangements which were familiar and traditional in the states with which those who responded were familiar. The tendency was not nearly so strong as in the replies of the attorneys general however, more of the governors being ready to modify existing arrangements.

Eight governors of states in which the attorney general is now popularly elected indicated a preference for retaining that method of selection, and expressed the feeling that the attorney general should be independent of the governor and need not necessarily see eye-to-eye with the governor. Five governors of such states expressed a desire to change that arrangement, however, and would abandon popular election of the attorney general in favor of making that official appointive by the governor, and subject to removal by the governor.

Governors replying from states where the attorney general is now appointive all wished to retain that arrangement. None were ready to change from appointment to popular election. One governor indicated approval of the arrangement in his state whereby the attorney general is appointed by the governor, but is not removable by him, and therefore enjoys a greater degree of independence than does the attorney general of Pennsylvania, for example. The Governor of Tennessee appeared to approve of the plan in effect in his state whereby the attorney general is appointed by the Supreme Court and remains independent of the governor.

The replies of three governors, all from states in which the attorney general is now popularly elected, were equivocal and non-committal and simply not subject to classification. One of these replies, incidentally, came from the governor of a state whose attorney general advised that during the past two years he had been in disagreement with many of the major political policies of the governor of the state and had brought action against various officers and employees of his administration. Even with this apparent antagonism, the governor did not appear prepared to take a definite position in favor of making the attorney general responsible to him through appointment and removal.[4]

The consistent loyalty of popularly elected attorneys general to the popular election of those officials seems natural and is probably to be expected. But if the theory of centralized state administration and the arguments for gubernatorial control over this office are as valid as most students of state administration have seemed to believe, then the reluctance of forty per cent of those governors replying, and of approximately eighty-five per cent of those replying from states where the office is elective, to favor making the attorney general responsible to the governor, appointed by and removable by him, is not so easily explained. Together with the fact that states which have revised their state constitutions have retained the elective attorney general, suggests here may be need for a deeper look at the nature of this office in state governments, at all its functions, its political significance, and so on, before the conclusion is lightly reached that it should be made subordinate to the governor.

Students of state government usually pass over this office hurriedly, and dismiss it with a few words, indicating that the attorney general gives legal advice to the governor and other state officials, represents the state in litigation to which it is a party, and in a few cases supervises the work of local prosecuting attorneys. They then conclude that, like other administrative work of the state, that of the attorney general should be brought into the hierarchy of command which culminates in the governor, by making him truly the head of a state department of justice, appointed by, removable by, and responsible to the governor. But as one reads the comments of the attorneys general and of governors who recommend the popular election of the attorney general, one detects a consciousness on their part of something more being involved in the basic duties and responsibilities of this office which sets it apart from other heads of departments in state government. A thin and not too easily definded thread of thought runs through all their comments, which seems to say that this is not solely a ministerial post; that its responsibilities go beyond and embrace something of the judicial and perhaps even of the representative; that the attorney general is not solely the governor's attorney, or even solly his administration's attorney, but is rather the people's and the state's attorney, responsible to maintain and protect the interests and rights of the people and of the state as against the governor and his administration, as well as to serve state officials in their execution of the state's laws; and that here is an institution about which hangs an aura of the ancient and of the common law, as well as constitutional statutory law, which marks it for special status and stature in the state governmental structure.[5]

Then, having detected this extra-ministerial concept of the office of attorney general, one looks in vain for any truly comprehensive empirical study and analysis of the duties and responsibilities of this office in American states which will reveal whether or not there is any basis in fact for this concept. Does it represent something real in the daily operations of this office, or is it merely an impression which occupants of the office have sought to create in the conscious or subconscious hope of creating stature that would not otherwise exist, and to muster popular support for resisting constitutional change? If there is substance to this concept of the office of attorney general, there may be good reason for retaining it as an elective office largely independent of the governor. If the concept lacks substance, that fact too should be established so constitution makers, and the voters who are called upon to ratify their work, will not be misled into giving the office a constitutional status which is not warranted by the facts.

Thus, in the case of the attorney general, as in that of the lieutenant governor, one is impressed with the apparent need, as a first step to deciding the constitutional status of the office, of a comprehensive empirical study of the office itself as is actually functions in state government. Certain questions need answering before one can say with complete confidence that the office should be subordinated to the executive will, with its incumbent appointed by, removable by, and responsible to the governor.

Precisely what duties does the attorney general have in American states? Does he have, legally and constitutionally, responsibilities and duties that are essentially judicial and non-ministerial? And even if he has, can it be established empirically that he is more independent, impartial, objective, and faithful to the law in discharging such duties when popularly elected than when appointed by and under the direction of the governor? Or does the relatively independent, but not elective, status the attorney general enjoys in New Hampshire, Tennessee, and New Jersey produce in practice the desired judicial independence better than does either popular election and direct popular responsibility, or gubernatiorial appointment and removal with responsibility to the governor. Empirical studies designed to provide answers based upon actual experience, in place of further abstract academic speculation, seem called for here to provide a factual basis upon which to reach decisions as to what "ought to be" constitutionally in connection with the office.

And while answers to the above questions are being found in actual experience, empirical studies might profitably also be conducted to determine exactly why, in spite of so much theory to the contrary, all of the states which have revised their constitutions in recent years have taken no action to reduce significantly the independence of the attorney general, and to bring him more fully under the control of the governor.[6] To what extent is this failure to make the attorney general a dependent administrative official in those states explainable in terms of a rational justification? To what extent is it to be attributed to the political power and the personal political organization of the attorney general in office at the time these constitutions were revised, with which constitution makers have been forced to come to terms and compromise as a condition of winning a sufficiently broad acceptance of their work to assure its approval by the voters? And to what extent is it attributable merely to the force of tradition?

Answers to all these questions should be available to those who must draft new constitutional provisions concerning the office of attorney general in American states. They should also be available to those who will be called upon to "sell" the product of future state constitutional conventions to the voters. They do not appear to be available now on any basis other than the inadequate one of abstract speculation.[7]

But can any recommendations be made as to an appropriate answer to this persisting question on the basis of what is known and the information which is available? Probably some can be made, but they must be made with the understanding that they can be only tentative until more is known about this office and what it actually does in practice.

The duties of the attorney general are fixed in state constitutions, in statutory law, and in common law, and in general have been summarized as including the following: giving legal advice to the governor and all other state officials including the members of the legislature; giving legal advice to local law enforcement officials; representing the state and its various administrative agencies in litigation; instituting proceedings against violators of state law; and supervising local government prosecutors in a few states.[8] In Florida, the attorney general also serves as reporter of the Supreme Court. In Texas, he also serves as an *ex officio* member of more boards and commissions than any other state executive or administrative official. The importance of the attorney general's advisory function has been stressed by Dr. Porter who points out that he is continually called upon to clarify unclear statutes and fix their meaning, and concludes, "Thus the attorney general's office is continually engaged in crystallizing or molding the law and pressing it into certain channels."[9]

Are these then duties and responsibilities which demand an independent status for the attorney general, and call for his direct popular election? Or are they duties and responsibilities which should be brought under the overall direction and supervision of the governor, by making the attorney general responsible to the governor in his discharge of them?

Supporters of popular election and independence of the attorney general contend first, that it is a mistake to think of the attorney general primarily as the governor's legal adviser; that while he admittedly does serve in that capacity, a great deal more of his effort is devoted to advising other administrative officials, the legislature, and local government agencies, representing the state in litigation and in taking care of the people's interests. They insist, therefore, that he is basically the people's lawyer, not the governor's lawyer, and represents the state as an entity, rather than the state administration only, and should therefore be elected by all the people and responsible to them.

It is emphasized by some that an important aspect of the attorney general's responsibility is his duty to check on the governor and his administration to prevent violation of the law and to expose official wrongdoing in the state government wherever it is found. It is argued that an appointive attorney general, subject to removal by the governor, would be unable to discharge this important responsibility. The attorney general of one state in replying to the inquiry discussed above, after indicating that he had been at odds with the incumbent governor for two years and had been forced to bring action against various state administrators, observe that he had been in favor of a strong governor but that he had now concluded that if the governor of such a state "happens to be interested solely in his own political advancement, and if he surrounds himself with amateurish or corrupt followers, the progress of many years may be erased almost overnight unless independent watchdogs have been established who have the power and the will to arrest the process of decay and corruption. In this event an independent and powerful attorney general can perform a great service for his state." Another argues that "There must be one independent officer within the state government who has ready access to the courts to control administrative excesses and forestall disregard of existing laws," while still another suggests that "One of the great checks and balances of our democratic form of government is the unrestrained authority of the Attorney General to interpret the law, without fear or favor, and in accordance with his construction of the statutes."

Another argument advanced in behalf of the election of the attorney general is that only an elected attorney general will be free to maintain true impartiality, detachment, and faithfulness to the law in formulating his legal opinions; that appointment and removal by the governor would subject the attorney general to undue political influence and pressure, tending to compromise his impartiality and objectivity, and inducing him to strain to reach an opinion approved by the appointive official, not only in legal advice to that official but in legal advice to others as well.

Some look upon the attorney general as more a judicial than an administrative official, and consider that the separation of powers doctrine demands his independence of the executive. This idea, for example, was expressed by the governor of a state which has gone farther than others in recognizing that character of the office in its arrangements for the selection and tenure of the attorney general. Others see in his authority to render opinions which are legally binding upon state agencies until reversed by the courts, an authority essentially judicial rather than administrative or ministerial in nature, and conclude that it would be improper for that reason to subordinate the attorney general to the governor.

It has also been argued that popular election provides the attorney general with a mandate from the people, which allows him, when his advice is sought, to command greater respect and prestige than would inhere in an appointive official whose advice they must accept merely because it is legally binding upon them.

Finally, it is argued that electoral stepping stones to the governorship should not all be abolished by making all executive and administrative officials appointive, and that perhaps the attorney general's office should remain elective as a training office for higher electoral responsibilities.

On the other side of the picture, those advocating making the attorney general appointive and removable by the governor, argue that the attorney general's function as a legal adviser to the governor and other state officers, and his duties to aid in the enforcement of state laws, are essentially part of the executive power and should be performed by one in agreement with the chief executive. They contend that only through the governor's power to appoint and remove the attorney general can the necessary agreement and harmony between the chief executive and his principal law officer be assured.

It is argued that since the attorney general is the legal adviser of the governor, the latter should have the privilege which all men exercise, of selecting as his legal adviser such a person as is in his judgment the most competent, one whose views are similar to his, and one in whom he has complete confidence.

Proponents of appointment also call attention to the fact that the governor is charged with the responsibility of seeing that the laws are faithfully executed, and is necessarily dependent upon the attorney general to a very large degree for the discharge of that responsibility. They contend that popular election of the attorney general and all local prosecuting attorneys divorces from the governor's control the agencies by which he is to execute those laws. Accordingly, they urge that the attorney general be appointed by and removable by the governor, so that he may in fact become the legal arm of the governor through which the latter discharges his responsibilities. They also frequently urge the appointment and control of local presecuting officials by the attorney general. This is urged in the interest of establishing an effective and integrated state-wide department of justice under the governor's direction, so that "responsibility for the due enforcement of the laws could be brought home, as it should be, directly to the Governor, upon whom the duty is devolved to see that the laws are faithfully executed."

It is urged further that by popular election of the attorney general, states always run the risk of having voters elect as an attorney general, a man who may not only be in open disagreement with the governor on important policy questions, but may actually be one of his outspoken political rivals, aspiring to the governor's office, with the result that the office of attorney general might well be used to obstruct the workings of government.

Some opponents of popular election contend that only through appointment can the attorney general be freed of the necessity to consider the influence of powerful voting interests in reaching his legal decisions; that popular election, and the usual attendant ambition for election to higher office, weakens the professionalism of the office, and causes the attorney general always to be cognizant of the political significance of his opinions and law enforcement activities; that appointment will free the attorney general for a more detached and impartial approach to the state's legal problems.

Dr. Kirk Porter, in urging the appointment of the attorney general, emphasized the stultifying effect an incompetent or unsatisfactory attorney general could have on the efficiency of the entire state administration, especially the regulatory agencies. "The problem involved here," said he, " is a very important one. It is bad enough when the department of public works, or the superintendent of public instruction, has to put up with unsatisfactory legal aid; but a department that is concerned with formulating regulations and with trying to enforce them may be stultified and paralyzed if it does not get satisfactory legal aid. In such a case, failure of the staff service is fatal to the entire project." He concludes that the governor must be free to correct any such deficiencies in the legal staff agency concerned, by the appointment of a competent attorney general.

Finally, it is maintained by some that personal selection of the attorney general by the governor tends to bring into the public service attorneys of marked ability and high reputation who might not be available if forced to submit to an election in order to obtain the office.

The arguments advanced by the proponents of popular election on the one hand, and by proponents of appointment on the other, reflect to some degree a difference in concept of the full nature of the office of attorney general, or at least a difference in emphasis on the important aspects of the office. It will be noted that those in favor of popular election see, or at least stress to a greater degree, that something extra in the attorney general's office, that something more than just giving legal advice and representing the state in litigation. It is these who seem to sense a responsibility to the whole people, an obligation to protect popular interests against abuse by public officials, and a judicial function in the attorney general's office, not sensed, or at least not emphasized by those who urge that the attorney general be appointed by and removable by the governor. Are they right? The evidence is simply not at hand at present upon which that question can be answered. If they are correct, then perhaps their conclusions too are justified. If not, then the primary foundation upon which their case for an independent status for the attorney general is built, crumbles. As a first step in resolving this question, therefore, some comprehensive empirical research into the true nature of this office seems called for, which will answer factually the questions these arguments pose.

Until such research is conducted, however, and until such answers are available, some conclusions seem to suggest themselves on the basis of information which we do have.

In the first place, making the attorney general appointive by the governor, fully and directly responsible to the governor, and subject to removal by him is completely consistent with the basic theory of the centralized administration and the strong, responsible governor. If the governor is to be held responsible for the handling of all the state's business, and to be given the authority to get it done efficiently and economically yet with proper recognition for the rights of its citizens, it follows almost inescapably that he must have control over the staff service of providing legal aid and advice to his other subordinates, as well as control over the line function of prosecuting offenders against the state laws and representing the state in all other litigation. Unless these activities are under the governor's control, and unless he is free to select the personnel charged with the responsibility for carrying them out, he cannot be held responsible for the way in which these duties are performed. The popular election of the attorney general with his responsibility being directly to the people produces a division and a diffusion of the basic responsibility of the governor to see that the laws are fairly executed, and flies in the face of accepted principles of good administrative organization.

At the same time, however, because of the almost universal responsibility of attorneys general to give legal advice not only to the governor but to all administrative officials, it would seem to follow logically that until the people of a state have abandoned the principle of administrative decentralization and diffusion, and have brought all other administrative agencies under the governor's direction and control, there may be merit in an independent attorney general—that perhaps the office of attorney general ought to be the last to be integrated into a centralized administrative hierarchy of command under the direction of the governor. As long as other department heads remain independent of the governor's control, and responsible directly to the people, the attorney general's legal and constitutional responsibility for providing legal advice and aid remains divided. He is as responsible for advising and aiding the independently elected department head as he is the governor. The division of executive and administrative authority and responsibility which is inherent in a decentralized administrative structure becomes an inherent feature of the constitutional and political system, and would seem to call for an independently elected attorney general, also responsible directly to the people for serving the several other independent agents of the people in the state executive department.[10] But when full centralization and integration of the rest of the state's administrative structure is achieved, then a like centralization and integration of the functions of providing legal advice and legal aid would seem called for.[11] Former President and Chief Justice William Howard Taft, one of the first presidents of the United States to make a serious effort to reorganize the administrative structure of the national government, saw this distinction when he testified before a committee of the New York Constitutional Convention in 1915. He advised that committee as follows.

> Well, if you are going to have a lot of independent officers who are running their own boats, paddling their own canoes, without respect to the head of the state, then of course you want a judicial officer to decide between them. But if you are running a government on the basis of a head man being responsible for what is done, and for the work being done in the most effective way, then what you want is a counsel. When you consult a lawyer, you don't consult a judge. You consult a man who is with you, seeking to help you carry out the lawful purposes that you have. Therefore, he ought to be your appointee. You select him. Now the chief executive is given an attor-

> ney-general to advise and represent him in legal matters. I don't see why he shouldn't be appointed. It would be most awkward if he was not in Washington, I can tell you that.[13]

As indicated earlier, those who want the attorney general to remain independent of the governor, popularly elected, and responsible directly to the people, stress the need of some "watchdog" responsible directly to the people to control administrative excesses. But it must be pointed out that even if that theory be accepted, then a watchdog is called for in turn to watch the watchdog, and at some point this series of watchdogs-watching-watchdogs-watch administrators has to terminate in the people being their own watchdog. They may just as well watch the governor directly, and if they are of a mind to do so and demand good government, their "watching" is much simpler when they have only the governor, responsible for the entire operation of the state's business, to watch, than when their attention must be divided.

The theory itself, however, and the assumptions implicit therein are subject to serious question.

This argument that there must be popularly elected agents within the executive department, especially an attorney general, to check upon the excesses of the governor, carries with it the assumption that these elected subordinate officials are consistently the "good guys" who can be trusted with power, and who will be honestly and truly representative of the public interest, while the governors are the "bad guys" liable to betary the public trust, and subject to temptations for wrongdoing which their elected subordinates are above. It is doubtful that the record will support such an assumption, that all the good is in one group of elected officials and all the bad in another. Quite the contrary might actually be expected in fact, in that the spotlight of public attention and publicity is always more clearly fixed upon the conduct of a governor than on that of the attorney general. And why too should it be assumed that the attorney general would reflect more accurately statewide public opinion and public interest than the governor, also elected in the same state-wide election, but in which beyond question he normally attracts far more attention and interest than the attorney general?

Moreover, in a system of separation and balance of powers such as prevails in American state government, the people have their representatives in the legislature, and they have their appeals to the courts as proper devices for checking and balancing the executive power. Checks and balances have no place within the executive department.

They operate as between the three great divisions or departments of government.

Again, these proponents of popular election stress the danger of political pressures and interference with the attorney general if he is appointed by a popularly elected governor who is naturally concerned about votes. They seem to think that the governor will require an appointed attorney general to administer the law with an eye to the political consequences of his every action, while at the same time assuming that a popularly elected attorney general, also interested in votes and reelection, will somehow be totally immune to political considerations in conducting the work of his office. To say the least, the logic of such reasoning is difficult to follow—so difficult as not to be at all persuasive.

The task of the administration of justice is a professional one, not a political one, and the incumbent of the attorney general's office ought to be interested first in the administration of justice as a professional function, not in personal political ambition on his way to the governor's office. It would seem that the professional nature of the work might be secured better by making the office appointive in a centralized and integrated state administration. If citizens are fearful of political forces exerting undersirable influence on the state's chief legal officer, it would seem that they would have more reason to be concerned with the popularly elected, politically ambitious attorney general who has his eye on the governor's chair. In this case, justice might be expected to be administered on occasion with something less than the highest professional standards, as professionalism finds it necessary to reconcile itself with passing political expediency. Certainly, direct popular election would appear to offer little advantage over gubernatorial appointment as a device for avoiding political influence in the work of the office.

Then there is the contention that the attorney general is the state's attorney, not the governor's attorney, and therefore he should be chosen by the people of the state as a whole, not by the governor. But even if it be granted that he is the attorney for the whole state, if the governor has been made responsible for the handling of all the state's business, then it follows that the governor must be free to select, direct, and supervise the attorney general in the latter's discharge of his responsibilities to the state, just as he does other executive and administrative officials in the discharge of their responsibilities to the state; that the governor being held responsible for the way in which all the state's business is handled may be expected to see to it that the attorney general discharges his responsibilities in the best interest of the state and its people, that in fact he is probably in a better position than the people themselves to see that he does do so. As Al Smith observed. "The attorney general is the state's lawyer, and the governor should select the lawyer. He is responsible."[13]

Thus, from the points of view of centralizing responsibility in state government in keeping with generally accepted theory of sound administrative organization, of maintaining an effective check against administrative excesses, of preserving an appropriate separation of powers and system of checks and balances, and of maintaining detached, impartial and professional standards in the administration of justice, it seems that making the attorney general an appointive official, appointed by, removable by, and responsible to the governor is preferable to popular election, where a thorough-going job of administrative centralization and integration is effected, as has been done in New Jersey, for example, or as is contemplated by the new Alaska Constitution.

This appears true with regard to the attorney general's duties of giving legal advice to the agencies of government, and of representing the state in litigation to which it is a party. But one troublesome problem remains. It appears that in some states at least, the attorney general's so-called advisory function does not stop with the giving of legal advice as such but goes further; that he has authority to render binding legal opinions. Such opinions are not simply advisory. They control, and until modified by the court are determinative of the law, and are therefore judicial and not ministerial in nature and application. In other states, the attorney general is a recorder for certain courts. It seems therefore that a careful survey of all the duties of attorneys general might well reveal a judicial aspect to the duties of some which has been overlooked in more superficial analyses of the office.

To the extent that the office is given judicial responsibilities there would appear to be reason for maintaining its independence of the executive, and the apparent presence of such duties suggest two alternative solutions to the problem. The first one would be to follow the New Hampshire or Tennessee plan of establishing a truly independent and judicial attorney general if in fact the duties of the office are such as to make it primarily a judicial office.

Secondly, consideration might be given to the possibility that there has developed an improper mixture of functions and responsibilities of the office in some states, and that they should now be separated, with the judicial ones being assigned to an appropriate official or body within the state's judiciary, and the ministerial being assigned to an attorney general properly integrated in a centralized administration responsible to the governor.

In any event, there is enough evidence to suggest that states concerned with revision of their constitutions need to take a careful look at the duties and responsibilities assigned to the attorney general, and be careful to see that the office is not provided for in a manner inconsistent with the nature of the duties and responsibilities assigned to it.

Footnotes

1. M. Barbara McCarthy, *The Widening Scope of American Constitutions*, p. 54.

2. See for example Kirk H. Porter, *State Administration*, (New York, Crofts, 1938), pp. 75-79. The Brookings Institution, *Organization and Administration of Oklahoma*, (Washington, D.C., 1935), pp. 106-107; also Oliver P. Field, Pressly S. Sikes, and John E. Stoner, *Bates and Field's State Government*, 4th Ed., (New York, Harper & Brothers, 1954), p. 316.

3. It would seem clear that the persisting question stated here should not be construed to imply that the attorney general would never give the governor technical legal advice other than that which he wanted, that it does not imply he should be merely a legal "yes man" regardless of the law, but rather refers to the broader aspects of administrative policy, implying that the attorney general should be in sympathy with the aims and goals of the administration, and should use his office to facilitate the achievement of those aims and goals within the law; that he should never be permitted to use his office to obstruct or weaken administrative policy for either partisan or personal political purposes.

4. One cannot know of course whether this hesitancy was bred of deep conviction in favor of popular election of the attorney general, or whether it manifested a practical recognition of the voting power of the attorney general's political organization in the state, which the governor preferred not to take any chance on further antagonizing

5. *The Encyclopaedia Britannica* in discussing the office of attorney general in Great Britain seems to have caught for that office a glimpse of what most attorneys general and some governors claim they see in the office in American states, when it observed that "The office of attorney general is therefore unique in character. He is a minister of the crown but he also exercises, particularly in the consideration of Petitions of Right, a judicial descretion. He is a representative of the interests of the crown and at the same time the guardian of the rights of the public, and the two may not always coincide. It is easy to conceive a conflict of duties and on this ground it has been contended that the recent innovation of giving him cabinet rank is a bad one as calculated to impair his independence as the guardian of the public rights." *The Encyclopaedia Britannica*, Vol. 2, 1954. p. 664.

6. New Jersey in 1947 did shorten his term of office from five to four years to make it correspond to that of the governor, but it did not make him removable by the governor during that term of office.

7. At public hearing held by the New York Temporary Committee on a Constitution Convention in 1957 "it was suggested that a study be made to determine whether the Attorney General should be appointed by the Governor rather than elected, in order to bring the Department of Law within the executive control" in New York State. The study does not appear to have been made by the time the voters decided against the calling of a state constitutional convention. Such a study might have provided answers to questions posed here in so far as one state is concerned at least.

8. See for example Porter, *State Administration*, pp. 79-97; and Claudius O. Johnson, *State and Local Govenment*, (New York, Crowell, 1950), p. 63.

9. Porter, *op. cit.*, p. 79.

10. Of course it might be argued that by making the attorney general responsible to, and the agent of, the governor in such a system would be one device by which he might control otherwise independent administrators, but this does not seem to be a desirable device for giving the governor influence with such administrative officials in the way an executive budget might be for example. Rather, it would appear that the attorney geneal's office is a poor instrument for affecting such influence or control, and smoother governmental operations would be likely to follow from maintaining that office consistent with the basic theory of the constitutional system within which it is to function.

11. It should be noted that centralization and integration only of the functions of providing legal advice and legal aid is called for here. The responsibility for making binding legal rulings may be a different matter as is discussed later.

12. Quoted by George C. S. Benson in *The Model State Constitution* 5th Ed., (New York, Municipal League, 1948), p. 35.

13. Alfred E. Smith in a speech before the New Jersey State League of Municipalities, quoted in A. E. Buck, *Reorganization of State Governments*, (New York, Columbia University Press, 1938), p. 23.

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